85-1672 (1)

No.

Supreme Court, U.S.
FILED
APR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM D. MERCHANT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether due process requires personal notice to a defendant, rather than notice to his attorney, of a scheduled court hearing.

2. Whether the Fourth Amendment exclusionary rule requires the suppression of evidence obtained by law enforcement officers acting in reliance on a facially valid judgment of probation, where that judgment is subsequently held invalid on the ground that it was entered at a proceeding that was procedurally defective.

## PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Cleo L. Marohn was named in the indictment, but she was dismissed from the case by the district court and did not appear in the court of appeals.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 760 F.2d 963. The opinion of the district court (App., *infra*, 15a-18a) is unreported.

### JURISDICTION

The judgment of the court of appeals (App., *infra*, 20a) was entered on May 14, 1985, and a petition for rehearing was denied on January 13, 1986 (App., *infra*, 19a). On March 6, 1986, Justice Rehnquist extended the time within which to file a petition for

a writ of certiorari to and including April 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment provides, in pertinent part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

## STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Northern District of California, respondent was convicted of manufacturing phencyclidine (PCP), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(5).[1] Respondent was sentenced to ten years' imprisonment, was fined $25,000, and was given a special parole term of seven years. App., *infra*, 4a; E.R. 216. The court of appeals reversed (App., *infra*, 1a-14a).

1. a. In 1980, respondent was convicted in California state court on two misdemeanor counts of

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[1] Respondent was named in the indictment as William D. Merchant (Excerpt of Record (E.R.) 1). The court of appeals' caption is in error.

brandishing a firearm.[2] App., *infra*, 2a, 16a. At the time of sentencing, the state court placed respondent on three years' probation. On one count, the state court sentenced respondent to one year's imprisonment, with the entire term suspended in favor of probation; on the other count, the court ordered respondent to serve six months in jail. 11/14/80 Tr. 7-8 (E.R. 54-55); see App., *infra*, 2a, 16a. As additional conditions of probation, the state court forbade respondent from possessing firearms during his probationary period and required him to "submit his person, residence or vehicle to search and seizure at any time of the day or night by a peace officer with or without a warrant" (11/14/80 Tr. 7-8 (E.R. 54-55); App., *infra*, 2a, 16a).[3]

Immediately after the court had pronounced sentence, a colloquy ensued among the court, respondent, and respondent's trial counsel. Respondent protested that the six-month period of incarceration would be financially burdensome because, as he put it, "what this means to me is everything I own. * * * I have $1,500 a month tractor payments which I cannot

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[2] At the time in question, Cal. Penal Code § 417(a) (West Supp. 1986) made it a misdemeanor for any person, inter alia, to draw or exhibit a firearm in the presence of another person except in self-defense. Section 417(b) made it a felony knowingly to commit the same acts in the immediate presence of a peace officer engaged in the performance of his duties. However, violations of Section 417(b) can be, and in this case were, prosecuted in a California Municipal Court as misdemeanors. See Cal. Penal Code § 17(b)(4) (West Supp. 1986) and § 1462 (West 1982). Since then, Section 417(a) and (b) have been amended, but those amendments are not relevant to this case.

[3] The state court's sentencing order is quoted in full in the court of appeals' opinion. App., *infra*, 4a-5a n.3.

make in jail" (11/14/80 Tr. 8 (E.R. 55)). In response to that plea, the state court agreed to "give you a stay of execution to allow you to enter any work furlough program. I don't want anyone to lose their job" (*ibid.*). Respondent's attorney then stated that he would appeal the conviction on the second count, on which respondent had been ordered incarcerated, and he asked if he could file a notice of appeal at that time (*ibid.* (E.R. 55); see also 5/21/81 Tr. 13). The court replied that the sentence would be stayed pending the appeal (11/14/80 Tr. 8-10 (E.R. 55-57)). At the conclusion of the sentencing proceeding, respondent signed a form acknowledging that he understood and consented to the search and firearms conditions of probation that the state court had imposed (E.R. 119; GX G-2-A; see 5/21/81 Tr. 21).[4]

b. Two months later, in January 1981, the local prosecutor received several reports from respondent's neighbors that they had heard the sound of gunfire coming from respondent's property; one neighbor also reported that he had seen respondent with a rifle (5/21/81 Tr. 72-73, 76-77, 89-90, 96-100). Believing that respondent may have violated his probation by possessing a firearm, the prosecutor examined the file on respondent's case and researched the effect of the stay of respondent's sentence on the conditions of his probation (*id.* at 100-101, 108-109). Although she concluded that only the six-month jail term had been stayed, and not the three-year probationary pe-

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[4] The state court judgment, executed by the clerk and filed on November 14, 1980, contains a handwritten notation at the bottom that reads (GX G-2-B): "Confinement date to be cont. pending appeal." The district court in this case took judicial notice of that judgment (5/21/81 Tr. 128, 130-131).

riod or its conditions (*id.* at 100-101, 113), the prosecutor did not immediately order a search of respondent's residence. Rather, on February 11 she filed and served on respondent's counsel a motion seeking clarification of the court's stay order, so as to eliminate any potential confusion concerning whether the conditions of respondent's probation were in effect (App., *infra*, 2a). Following the filing of that motion, respondent's counsel had several telephone conversations with his client, but he did not advise respondent about the hearing (5/21/81 Tr. 5, 15-17, 25-26).[5]

The prosecutor's motion came on for a hearing on February 27 (App., *infra*, 2a). Shortly before the hearing began, the prosecutor told respondent's counsel about the reports of gunfire from respondent's property (5/21/81 Tr. 101). At the outset of the proceeding, the state court noted that respondent's counsel was present, but that respondent was not (App., *infra*, 22a) Respondent's counsel did not object to conducting the proceeding in respondent's absence, and on the merits he consented to the prosecutor's motion (*ibid.*). The court then stated that the "Court will grant the motion for clarification. Defendant will be reinstated on the terms of probation" (*ibid.*). The court made clear that "[t]he entire probation order that he signed," including the provision forbidding respondent from possessing firearms, was in effect, although respondent was not yet required to report for confinement (*ibid.*). Respondent's counsel subsequently wrote respondent a letter to inform

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[5] Respondent's counsel apparently believed that his client's presence was unnecessary because the hearing would not affect his bail status or his appeal on the count as to which he received the jail term (see 5/21/81 Tr. 14; see also *id.* at 12-16).

him about the proceeding and the fact that the conditions of his probation were in effect (5/21/81 Tr. 10, 19-20, 21, 22, 23-24).[6] Respondent, however, never received that letter (*id.* at 6, 7, 8-9).

c. Four days later, on March 3, several police officers, the local prosecutor, and a civil process server went to respondent's house to conduct a search for firearms and to execute a civil judgment against respondent (5/21/81 Tr. 28-29). After the officers stated their purpose, respondent protested that he was not on probation and asked to speak with his lawyer (*id.* at 31). Respondent was allowed to call his attorney, who told the prosecutor that respondent had not been notified of the state court's February 27 order (App., *infra*, 3a; 5/21/81 Tr. 10, 22-23, 121-122; E.R. 149-153). The state prosecutor decided that the search should be conducted nonetheless. During the ensuing search, the officers discovered approximately 80 firearms scattered throughout the house, a suitcase containing approximately three pounds of methaqualone tablets (quaaludes), a large quantity of chemicals and laboratory equipment that could be used to manufacture PCP, and approximately $360,000 in cash (App., *infra*, 3a, 16a-17a; 5/21/81 Tr. 33-38, 49-50). At that point, the officers arrested respondent and halted their search in order to obtain a telephonic search warrant for respondent's residence (App., *infra*, 3a; 5/21/81 Tr. 38-39, 46). After obtaining the warrant, the officers discovered additional narcotics and laboratory equipment (App., *infra*, 3a, 17a).

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[6] The letter stated, in part, that " '[b]asically the district attorney wanted to maintain the probationary order as active on the first count. The court ordered that the probation remain effective pending the appeal' " (5/21/81 Tr. 23-24).

2. Based on the evidence seized during the search of respondent's house, a federal grand jury indicted respondent on three narcotics charges (E.R. 4-5). Before trial, respondent moved to suppress the evidence seized from his residence on the ground, inter alia, that the search could not be justified under the consent-to-search provision of his probation order, since he had not been notified of the state court's February 27 hearing or order.

The district court denied the motion for two independent reasons (App., *infra*, 15a-18a). First, the court held that the search was lawful because respondent was on probation at that time (*id.* at 17a). The court found that the state court had stayed only that portion of respondent's sentence ordering his incarceration and had not stayed the imposition of probation (*ibid.*). Second, the court held that, in any event, the evidence seized during the search of respondent's house should not be suppressed (*id.* at 18a). The court found that "the law enforcement personnel involved and, for that matter, [respondent's] attorney * * * all held a good faith belief that they had the authority to make a warrantless search of [respondent's] residence based on the [state] trial court's ruling on the motion for clarification or modification" (*ibid.*). Concluding that the exclusionary rule should not apply where evidence " 'is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken[,] belief that they are authorized,' " the court denied respondent's suppression motion (*ibid.*, quoting *United States* v. *Williams*, 622 F.2d 830, 840 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981)).[7]

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[7] The municipal court judge who had originally sentenced respondent later revoked his probation because of the dis-

3. a. The court of appeals reversed (App., *infra*, 1a-14a). At the outset, the court held that respondent had not been placed on probation when he was sentenced on November 14, 1980, because the state court had stayed respondent's entire sentence and not merely that portion requiring his incarceration (*id.* at 5a-6a). The court of appeals then ruled that the state court's February 27, 1981, order was invalid because respondent was not given personal notice of the proceeding (*id.* at 6a-10a). Characterizing the February 27 proceeding as "neither a revocation nor an extension of probation, but * * * what amounted to an initial imposition of probation" (*id.* at 8a), the court held that the consent-to-search provision of the probation order constituted a burden on respondent's liberty, requiring that he be given personal notice of the proceeding (*id.* at 8a-9a). Stating that "[t]he right to notice under the fifth and sixth amendments is personal to the defendant" (*id.* at 9a), the court concluded that "[n]otice to and the presence of [respondent's] attorney does not suffice" for due process purposes (*id.* at 10a (footnote omitted)). Because respondent had not been personally notified of the February 27 hearing, the court held that the order the state court entered on that day was "a nullity"

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covery of firearms in his residence. However, the Superior Court Appellate Division reversed that order, on the ground that respondent was unaware that the conditions of his probation were in effect. *People* v. *Merchant*, No. 296 (Cal. Super. Ct. Nov. 17, 1981), slip op. 2 (E.R. 117). In so ruling, however, the court expressly stated that "[w]e do not in any respect disagree with the decision of the * * * District Court * * * [in this case], * * * which held that the trial court intended to impose probation effective November 14, 1980[,] and that, in any event, the probation search was lawful." Slip op. 2-3 (E.R. 117-118).

*(ibid.)*. Accordingly, the court concluded that, because respondent was not actually on probation at the time of the search of his residence, the search could not be upheld on the strength of the consent-to-search clause in the state court's probation order (*ibid.*).

b. The court of appeals then turned to the question whether the evidence seized from respondent's house was nevertheless admissible under *United States* v. *Leon*, No. 82-1771 (July 5, 1984), given the officers' reliance on the consent-to-search clause contained in the original probation order. App., *infra*, 10a-14a. The court held that the evidence was not admissible because, in the court's view, "none of the law enforcement officers reasonably could have believed that the search related to the interests of effective probation supervision" (*id.* at 11a-12a). The court acknowledged that the prosecutor decided to conduct the search because of the reports of gunfire from respondent's property, which indicated that respondent had violated the condition of his probation that he not possess firearms during his probationary period (*id.* at 12a). However, the court found significance in the fact that, at the time of the search, respondent had not yet been assigned a probation officer and had not received any counseling or supervision, that the prosecutor did not inform either the probation department or the state court of the reports of gunfire, and that she also did not tell the state court at the February 27 hearing about her earlier conversations with local law enforcement officers regarding her desire to search respondent's residence (*ibid.*). Relying on these facts, the court of appeals concluded that "the search was a subterfuge for conducting a criminal investigation" (*ibid.*) and was not "a genuine attempt to enforce probation" (*id.* at 13a). Concluding that the officers' be-

havior "is the type of law enforcement conduct that ought to be deterred" (*ibid.*), the court held that *Leon* was inapplicable and that the evidence seized from respondent's house should be suppressed (*ibid.*).

## REASONS FOR GRANTING THE PETITION

1. A longstanding and previously unquestioned feature of both criminal and civil litigation in our legal system is the practice of providing notice of scheduled judicial proceedings to the affected parties through their attorneys. This practice, which is codified in the Federal Rules of Criminal and Civil Procedure, is bottomed upon concerns of practicality and efficiency, as well as the determination that in an adversary system an attorney can and should be trusted with the responsibility of providing his client with the information necessary to a just defense or the prosecution of his cause.

In this case, the court of appeals held that the Due Process Clause requires personal notice to a defendant of a scheduled judicial proceeding, even though the defendant's attorney has been notified of the time and nature of the proceeding. This ruling constitutes a departure from the principles of representative litigation and is inconsistent with provisions of the Federal Rules of Criminal and Civil Procedure. Beyond that, the court of appeals' ruling has the potential for considerable mischief. It creates needless uncertainty as to whether a defendant has been afforded actual notice of scheduled proceedings. It imposes on the prosecutor or the court the burden of duplicating steps that should properly be left to defense counsel. And it invites claims that the defendant was not personally notified and that any ensuing proceeding, as the court of appeals put it, is a "nullity," even though, as here, defense counsel has had

an ample opportunity to inform his client of the proceeding. Given the substantial burdens that may result from the court of appeals' ruling on the notice issue, review by this Court is warranted.

a. The Due Process Clause generally requires personal service of the pleading that commences a civil action because that manner of service ensures that a person will be notified of the pendency of the suit and will have the opportunity to "choose for himself whether to appear or default, acquiesce or contest" a claim against him (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). See, *e.g.*, *Greene* v. *Lindsey*, 456 U.S. 444, 449 (1982). For much the same reason, the Sixth Amendment requires that a defendant in a criminal case "be informed of the nature and cause of the accusation" (U.S. Const. Amend. VI). See, *e.g.*, *In re Oliver*, 333 U.S. 257, 273 (1948). The Federal Rules of Civil and Criminal Procedure implement these principles by requiring that the defendant be served with the pleading, such as the complaint, summons, or indictment, that commences a civil suit or a criminal prosecution. See Fed. R. Civ. P. 4(d); Fed. R. Crim. P. 4(d)(3), 9(c), 10; 18 U.S.C. 3432.[8]

Once a party has retained counsel, due process does not require that the party be personally served with subsequent pleadings or be given personal notice of subsequent proceedings. On the contrary, it is well settled that in our system of representative litigation pleadings may be served on counsel rather than on a

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[8] Even with respect to the original charging document in a criminal case, the courts have not insisted on personal service on the defendant, as long as the defendant receives notice of the charges. See *United States* v. *Clark*, 407 F.2d 1336, 1337 (4th Cir. 1969).

party, even when a motion contemplates or calls for a hearing. In fact, the Federal Rules of Criminal and Civil Procedure expressly *require* that all subsequent motions be served on counsel rather than on a party. See Fed. R. Crim. P. 49(b); Fed. R. Civ. P. 5(b).[9] It is likewise clear that notice to a party's counsel of the pendency of a proceeding is equivalent to notice to the party himself. As this Court has explained, once a party voluntarily chooses an attorney as his representative in the action, he "is considered to have 'notice of all facts, notice of which can be charged upon [his] attorney.'" *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1879)). And as *Link* itself held, the "facts" that may properly be charged to a party include the dates and nature of scheduled hearings. See 370 U.S. at 633-635 (counsel's failure to attend a scheduled pretrial conference, coupled with other

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[9] See 4 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1145, at 583 (1969) (footnote omitted) ("[t]he requirement of service on the attorney [in Fed. R. Civ. P. 5(b)] is to be followed literally; service upon a party represented by an attorney does not comply with the rule"); 3A C. Wright, *Federal Practice and Procedure: Criminal* § 822, at 234-235 (1982) (stating that Fed. R. Crim. P. 49(b) should be construed in the same manner as Fed. R. Civ. P. 5(b)).

Indeed, the legal profession frowns on direct communications between an attorney and an opposing party. See *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 31 n.52 (Stevens, J., dissenting); ABA *Model Rules of Professional Conduct* 4.2 (1983) ("[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so"); ABA *Model Code of Professional Responsibiilty* DR 7-104(A)(1) (1980).

proof of dilatoriness, may justify dismissal of a suit with prejudice).[10]

It is immaterial that the February 27 hearing took place during a criminal prosecution, rather than a civil suit. The role of defense counsel as the representative designated to receive notice does not differ in the two types of proceedings. See *Jones* v. *Barnes*, 463 U.S. 745, 751-754 & n.6 (1983).[11] Nor does it

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[10] The courts of appeals have reiterated and applied this principle in a wide variety of circumstances. See, *e.g.*, *Salahuddin* v. *Coughlin*, 781 F.2d 24, 27 (2d Cir. 1986) (prison officials are charged with knowledge of court orders entered in a case); *Townsend* v. *Gray Line Bus Co.*, 767 F.2d 11, 19 (1st Cir. 1985) (counsel's failure to appear at a status conference and to object to the substitution of a new judge is charged to his client); *Loyd* v. *Loyd*, 731 F.2d 393, 400 (7th Cir. 1984) (notice to counsel of scheduled probate hearing is deemed to be notice to his client); *United States* v. *Everett*, 700 F.2d 900, 902 n.5 (3d Cir. 1983) (notice to defense counsel that the government has taken an appeal and has filed its brief is deemed to be notice to the defendant). Prior to this case, the Ninth Circuit had also applied this principle. See *NLRB* v. *Sequoia District Council of Carpenters*, 568 F.2d 628, 633 (1977) (notice to counsel of entry of an order binds his client).

[11] For example, the decision how to respond to legal motions is a judgment for defense counsel, not the defendant, to make. See, *e.g.*, *Jones* v. *Barnes*, 463 U.S. at 751-754; see also *Wainwright* v. *Sykes*, 433 U.S. 72, 91 n.14 (1977); *id.* at 93 (Burger, C.J., concurring); *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976); *id.* at 515 n.4 (Powell, J., concurring); *Brookhart* v. *Janis*, 384 U.S. 1, 8 (1966) (Harlan, J., concurring); *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). Moreover, a lawyer's ethical obligation to consult with his client regarding the conduct of the defense has no less force in criminal than in civil cases. See *Jones*, 463 U.S. at 753 n.6 ("an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client").

matter for the purpose of notice whether the February 27 hearing is characterized as a sentencing hearing, as the court of appeals described it (App., *infra*, 8a), or merely as a proceeding to clarify the court's previous order. The Constitution imposes no special requirement of notice with respect to sentencing, beyond what is required for other proceedings. And a defendant has the same right to the assistance of counsel at sentencing that he has at other stages of the criminal process. See *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Accordingly, notice to counsel is considered to be notice to the client with regard to a sentencing proceeding, just as in the case of any other type of hearing. Because respondent's counsel had notice of the February 27 hearing, neither the prosecutor nor the court was constitutionally required to notify respondent personally.[12]

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[12] The court of appeals left open the question whether respondent had a constitutional right to be present at the February 27 proceeding. App., *infra*, 10a n.5. Therefore, there is no need for the Court to decide that issue in the first instance. However, there are substantial reasons to doubt that respondent had a constitutional right to be present at the hearing and that his absence rendered the hearing invalid.

A defendant's right to be present at trial is rooted in part in the Confrontation Clause of the Sixth Amendment. See *United States* v. *Gagnon*, No. 84-690 (Mar. 18, 1985), slip op. 4; *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). That right has no application here, since no witness testified at the hearing. *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934); see *Gagnon*, slip op. 4; see also *Rushen* v. *Spain*, 464 U.S. 114, 129-130 n.8 (1983) (Stevens, J., concurring).

To the extent that the right to be present stems from the Due Process Clause (see *Gagnon*, slip op. 4), that provision is likewise inapplicable in this case. As the Court recently noted, "a defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably

b. The court of appeals' decision is not supported by either of the cases it cited (App., *infra*, 9a).

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substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' " *Gagnon*, slip op. 4 (quoting *Snyder*, 291 U.S. at 105-106, 107-108); see *Spain*, 464 U.S. at 129-130 n.8 (Stevens, J., concurring) ("we have viewed a potential for prejudice as a necessary element of a violation of the right to be present"); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) (the defendant "has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"); see also *Snyder*, 291 U.S. at 106-107 (due process does not "assure[] the privilege of presence when presence would be useless, or the benefit but a shadow"). There is no reason to suppose that respondent's presence at the ministerial and perfunctory proceeding on February 27 could have contributed to his defense, particularly in light of the concession by respondent's counsel that the prosecutor's motion was well taken. Cf. *Snyder*, 291 U.S. at 109. Nor does it matter if the effect of the state court's order was to advance the date on which the conditions of respondent's probation, which had already been imposed at sentencing, would go into effect. See *Schwab* v. *Berggren*, 143 U.S. 442, 451 (1892) (defendant has no right to be present when an appellate court fixes the date of execution on a sentence imposed by the trial court). And even if the absence of an objection at the hearing by respondent's counsel does not constitute a waiver of respondent's claim (but cf., *e.g.*, *Howard* v. *Kentucky*, 200 U.S. 164, 173 (1906) (due process not violated by trial court's in camera questioning of juror in absence of defendant and defense counsel where defense counsel had agreed to that procedure)), the absence of an objection by respondent's counsel adds support to the conclusion that respondent was not prejudiced (see *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 18 & n.11).

Finally, it is well settled that a defendant has no right to attend a proceeding that is devoted to purely legal questions. See, *e.g.*, Fed. R. Crim. P. 43(c)(3) (defendant need not be

*Faretta* v. *California*, 422 U.S. 806 (1975), stated that, under the Sixth Amendment, "[i]t is the accused, not counsel, who must be 'informed of the nature and cause of the accusation'" (*id.* at 819). That principle, however, has no bearing on the question whether the accused has the right to personal service of all pleadings filed during the course of a criminal case or to personal notice of all subsequent hearings on such motions. *Wheeler* v. *United States*, 640 F.2d 1116 (9th Cir. 1981), is also beside the point. There, the district court, acting ex parte, entered an order directing a warden to prevent a prisoner from communicating with the witnesses at his trial. The prisoner, who was not represented by counsel, did not become aware of the order until four years after its entry. Relying on its supervisory powers (*id.* at 1122 n.14), the court of appeals ruled that the district court, absent compelling circumstances, should have held a hearing before entering the order, since the order restricted the prisoner's First Amendment rights (*id.* at 1122). Because *Wheeler* involved an ex parte proceeding—not one in which defense counsel was notified and appeared at the proceeding—that case is not even remotely relevant here.

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present "[a]t a conference or argument upon a question of law"); *Price* v. *Johnston*, 334 U.S. 266, 285 (1948) (defendant has no right to attend appellate proceedings); *Schwab* v. *Berggren*, *supra* (same); *United States* v. *Graves*, 669 F.2d 964, 972-973 (5th Cir. 1982) (defendant has no right to attend a bench conference on jury instructions) (collecting cases). The February 27 hearing involved a purely legal matter—the effect of the state court's stay order—of the sort that would not give rise to a constitutional right to be present.

c. Although we do not mean to overstate the practical effect of the court of appeals' decision, that ruling, if applied broadly, would impose a needless burden on the criminal trial process. The court's decision would require the prosecutor to advise the accused of the developments in the litigation, at the risk that the defense will claim that the prosecutor has interfered with the attorney-client relationship. Alternatively, the court of appeals' ruling would require the district courts to engage in the formality of sending a defendant personal notice of every upcoming proceeding. In either case, unless personal service rather than the mail is used to provide notice, the court of appeals' ruling invites litigation over the questions of whether and when a defendant in fact received notice of a proceeding.

At the same time, requiring the accused to be personally notified of every hearing will not appreciably increase the likelihood that he will be present at proceedings at which his presence is essential but which he would otherwise not attend. It is most unlikely that defense counsel will fail to inform the defendant of such proceedings and that both the court and the prosecutor will also overlook his absence. However, it is only that narrow category of cases in which the court of appeals' ruling will have any appreciable benefit. The court of appeals' ruling thus will lead to needless makework in the vast majority of cases, without substantially contributing to the purposes for which the Due Process Clause ordinarily requires notice.

2. The court of appeals' ruling is also inconsistent with this Court's decisions in *United States* v. *Leon*, No. 82-1771 (July 5, 1984), and *Massachusetts* v. *Sheppard*, No. 82-963 (July 5, 1984). In those cases,

the Court held that evidence obtained by law enforcement officers who reasonably relied on a facially valid search warrant should not be suppressed at trial, even if the warrant is subsequently found to be defective. The Court noted that evidence so acquired should not be suppressed as long as the officers' reliance on the warrant was "objectively reasonable." *Leon*, slip op. 23; accord *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 5, 8-9. Here, the court of appeals disregarded this principle. The court ruled that evidence obtained by police officers in reliance on a facially valid probation order must be suppressed because of a procedural defect in the proceeding at which that order was issued. Moreover, in ruling that suppression was required because the search was a subterfuge for a criminal investigation, the court of appeals ignored the prosecutor's reasonable course of conduct in obtaining clarification of the state court's order. The court also ignored the officers' adherence to well-settled principles of state law and the goals of the California probation system in executing the search. Because the court of appeals' decision disregards the principles underlying this Court's ruling in *Leon*, the Court should also review this question as well.

a. In *Leon*, the Court explained that the exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates" (slip op. 16) and that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations" (*id.* at 22 (footnote omitted)). Accordingly, the Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion" (*id.*

at 22-23). See *Sheppard*, slip op. 5-8; see also *Michigan* v. *DeFillippo*, 443 U.S. 31, 37-38 (1979).

The principles set forth in *Leon* and *Sheppard* are fully applicable to this case. Just as a search or an arrest warrant can authorize a police officer to enter and search the residence of a probationer (see, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980)), the California courts have long held that the "consent-to-search" clause involved here, which authorized any peace officer to enter and search respondent's residence, may be imposed by the courts as a condition of probation and is valid under the Fourth Amendment. See, *e.g.*, *People* v. *Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), cert. denied, 405 U.S. 1016 (1972).[13] In both cases, it is the re-

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[13] Under California law, probation orders commonly contain a provision, such as the one here, requiring probationers to submit to warrantless searches " 'whenever requested to do so' " by a probation officer " 'or any law enforcement officer.' " See, *e.g.*, *People* v. *Mason*, 5 Cal. 3d at 762, 488 P.2d at 631, 97 Cal. Rptr. at 303. The constitutionality of such a condition in California is "beyond dispute" (5 Cal. 3d at 764, 488 P.2d at 632, 97 Cal. Rptr. at 304). See also 3 W. LaFave, *Search and Seizure* § 10.10, at 422-423 (1978) (noting that "there is considerable authority" that courts may validly impose warrantless search provisions in probation orders). However, there must be reasonable grounds to "trigger" a search, and any resulting search must be conducted in a reasonable manner. See *United States* v. *Johnson*, 722 F.2d 525, 527-528 (9th Cir. 1983); *People* v. *Guerrero*, 85 Cal. App. 3d 572, 581-582, 149 Cal. Rptr. 555, 560 (1978); *People* v. *Kasinger*, 57 Cal. App. 3d 975, 978, 129 Cal. Rptr. 483, 485 (1976). The reports of gunfire coming from respondent's property provided reasonable grounds here. See *People* v. *Britton*, 156 Cal. App. 3d 689, 696, 202 Cal. Rptr. 882, 887 (1984).

Moreover, California law does not require that it be a probation officer who conducts the search of a probationer. See, *e.g.*, *People* v. *Mason*, *supra*; *People* v. *Palmquist*, 123

sponsibility of a judicial officer to determine whether an intrusion on a person's privacy is justified and, if so, to issue an order, whether in the form of a warrant or a judgment of probation, comporting with Fourth Amendment requirements. In both cases, a police officer cannot reasonably be expected to question the judicial officer's judgment that the order is legally sound. See *Leon*, slip op. 21-22. And in both cases, once the order is entered, " 'there is literally nothing more the policeman can do in seeking to comply with the law.' " *Id.* at 22 (citation omitted). Accordingly, there is no material difference for present purposes between a search warrant issued by a magistrate and a consent-to-search clause imposed as a condition of probation in the sentence handed down by a trial court. Cf. *Gluck* v. *United States*,

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Cal. App. 3d 1, 7-8 & n.3, 176 Cal. Rptr. 173, 177 & n.3 (1981). Compare *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 262-266 (9th Cir. 1975) (en banc) (construing Federal Probation Act, 18 U.S.C. 3651, as imposing on probation officers the primary responsibility for conducting searches of probationers). Nor, under California law, is the "legality of a probation search * * * determined by the relationship, or lack thereof, of the probation offense to the conduct relied upon to justify the search." *People* v. *Constancio*, 42 Cal. App. 3d 533, 539, 116 Cal. Rptr. 910, 913 (1974). At most, it is sufficient that officers perceive the existence of "circumstances indicating that in connection with effective probation supervision a search is advisable" (*People* v. *Guerrero*, 85 Cal. App. 3d at 582, 149 Cal. Rptr. at 560; *People* v. *Kasinger*, 57 Cal. App. 3d at 978, 129 Cal. Rptr. at 484-485; *People* v. *Bremmer*, 30 Cal. App. 3d 1058 1065-1066, 106 Cal. Rptr. 797, 802 (1973)) and that they announce their authority and purpose prior to entering a residence to conduct a search pursuant to a probation order (see *People* v. *Freund*, 48 Cal. App. 3d 49, 57-58, 119 Cal. Rptr. 762, 767-768 (1975)).

771 F.2d 750, 757-758 (3d Cir. 1985) (summons issued in good faith reliance on a Fed. R. Crim. P. 6(e) disclosure order later held to be defective); *People* v. *Barbarick*, 168 Cal. App. 3d 731, 214 Cal. Rptr. 322, 328 (1985) (good faith reliance on a consent-to-search clause in a release-on-recognizance order; "[h]ere a detached and neutral magistrate issued a facially valid search condition").[14]

The officers' reliance on the consent-to-search clause contained in the probation order was also objectively reasonable. Here, as in *Sheppard*, the prosecutor and the police officers "took every step that could reasonably be expected of them" (*Sheppard*, slip op. 6). The prosecutor sought to clarify respondent's status by filing a motion with the judge who had imposed his sentence. She served the motion on respondent's attorney, who appeared at the hearing and who did not object to going forward in respondent's absence. The officers were advised that the state court had ruled that respondent was on probation and that he was forbidden from possessing firearms during his probationary period. Even if the hearing was invalid because respondent had not been personally notified of its occurrence, the officers were not responsible for respondent's absence from the proceeding or for his failure to receive notice, and neither the officers nor the prosecutor could reasonably be charged with

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[14] As the California Court of Appeals explained in *People* v. *Bremmer*, *supra*, a challenge to the reasonableness of a search conducted pursuant to the terms of a probation order "is analogous to that arising from a claim that a search warrant has been issued by a magistrate on less than probable cause or an arrest warrant on less than reasonable cause. Our present concern is with judicial power rather than police power." 30 Cal. App. 3d at 1062-1063, 106 Cal. Rptr. at 800.

knowledge that the hearing was invalid for the reason given by the court of appeals. In that respect, this case is not materially different from *Sheppard*, in which the Court refused to apply the exclusionary rule because of the magistrate's technical mistake in preparing a search warrant. Finally, both the state municipal court and the district court in this case (App., *infra*, 17a) ruled that respondent was in fact on probation, which is powerful evidence that the officers' actions were objectively reasonable. See *Leon*, slip op. 27.

b. The court of appeals held that *Leon* was inapplicable because "the search was a subterfuge for conducting a criminal investigation" (App., *infra*, 12a) and the participants "apparently had a motive of avoidance of Fourth Amendment requirements" (*id.* at 13a). That conclusion is both legally and factually erroneous.

As a legal matter, the court of appeals ignored the fact that the California law enforcement officers were acting not only in accordance with the terms of a facially valid probation order, but also consistently with well-settled California law regarding the execution of probation searches under consent-to-search clauses. Although the court of appeals charged the officers with conducting a bad faith, pretextual search, the California courts have long held that consent-to-search clauses can validly serve as the basis for probation searches, and that a probation officer need not be a party to the search. See, *e.g.*, *People* v. *Mason*, *supra*; *People* v. *Palmquist*, 123 Cal. App. 3d 1, 7-8, 176 Cal. Rptr. 173, 177 (1981).[15] Because the officers

[15] The cases on which the court of appeals relied in criticizing the state authorities (App., *infra*, 12a) stated that there must be a reasonable factual predicate for conducting a pro-

were acting consistently with the terms of the probation order and settled state law construing such orders, the search cannot fairly be considered a "subterfuge" conducted in bad faith.

There is also no factual basis for the court's conclusion that the officers used the search as a subterfuge for a criminal investigation. Indeed, based on the same record the district court found that the officers acted in good faith (App., *infra*, 18a). The undisputed evidence showed that the sole purpose for the search was to determine whether respondent possessed a firearm in violation of the condition of his probation (5/21/81 Tr. 49, 72, 73, 77, 82, 96-100). The court of appeals also failed to identify the crime that was the supposedly true purpose for the search, and the record does not suggest what that offense was. It was not a crime for respondent to own a firearm, since he had not been convicted of a felony. Pages 2-3, *supra;* see 18 U.S.C. 922(h)(1); 18 U.S.C. App. 1202(a)(1). It was also not a crime for a person to discharge a weapon in the rural area where respondent lived (5/21/81 Tr. 46). Only the conditions of respondent's probation condition made his possession of a firearm relevant. And the officers had no reason to suspect that respondent had a narcotics laboratory in his basement; the officers inadvertently discovered the equipment in plain view while searching for weapons (*id.* at 33-39).

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bation search. See *United States* v. *Johnson*, 722 F.2d at 527-528. Cf. *United States* v. *Jarrad*, 754 F.2d 1451, 1454 (9th Cir. 1985), cert. denied, No. 84-6659 (Oct. 7, 1985) (parole search); *Latta* v. *Fitzharris*, 521 F.2d 246, 251-252 (9th Cir.) (en banc), cert. denied, 423 U.S. 897 (1975) (same). In light of the information possessed by the law enforcement officers about the gunfire coming from respondent's property, the probation search in this case would not run afoul of any of those cases.

Finally, the facts on which the court of appeals relied in concluding that the search was a subterfuge (App., *infra*, 12a), are entirely inconsequential. That respondent had not been assigned a probation officer and had not received any counseling or supervision at most may suggest that the state had not yet made any active effort towards rehabilitating respondent, but it does not mean that the search was unrelated to the purposes of probation. The protection of the public is an important goal of the California probation process. See, *e.g.*, *People* v. *Mason*, 5 Cal. 3d at 764, 488 P.2d at 632, 97 Cal. Rptr. at 304; *People* v. *Britton*, 156 Cal. App. 3d 689, 697, 202 Cal. Rptr. 882, 887 (1984). Determining whether respondent had firearms was directly related to this aspect of probation. After all, he had recently been convicted of brandishing firearms, and the judge who had imposed his probation had made clear at the time of sentencing his concern that respondent not possess firearms.[16]

For much the same reason, it is immaterial that the prosecutor did not inform the sentencing judge at the February 27 hearing of the reports of gunfire on respondent's property or her intent to search his residence for weapons. Given the judge's stated concern that respondent not possess weapons, this information surely would not have dissuaded the judge from granting the prosecutor's motion for clarification. And the prosecutor informed respondent's coun-

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[16] Before imposing sentence, the state trial court commented that "[w]hat really scares me, Mr. Merchant, in my role in protecting the community[,] is that you are just that close in certain instances to violence being committed, and you are just not a man that should have or be near any guns at all" (11/14/80 Tr. 6-7 (E.R. 53-54)).

sel before that hearing began of those reports (page 5, *supra*), so it is clear that she was not attempting to keep any information from respondent. Accordingly, even if the search could not be justified on the basis of the consent-to-search clause in respondent's sentence, the evidence seized from his residence by the officers during a search undertaken in reasonable reliance on the state court's February 27 order and the governing principles of state law should not be subject to suppression.[17]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1986

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[17] In *Illinois* v. *Krull*, cert. granted, No. 85-608 (Mar. 24, 1986), this Court has before it the related question whether the exclusionary rule requires the suppression of evidence seized in reasonable reliance on a statute authorizing warrantless administrative searches that is later held unconstitutional. However, we do not suggest that the Court should hold this petition pending the disposition of *Krull*. The circumstances there make it unlikely that the Court's decision will directly control the disposition of this case, which more closely resembles the situation in *Leon* and *Sheppard*.

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 83-1135

D.C. No. 81-109-SW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

DAVID WILLIAM MERCHANT, DEFENDANT-APPELLANT

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Appeal from the United States District Court
for the Northern District of California
Hon. Spencer M. Williams, Presiding

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[Filed May 14, 1985]

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OPINION

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BEFORE: MERRILL, FLETCHER, and CANBY, Circuit Judges.

FLETCHER, Circuit Judge:

David Merchant appeals his conviction for manufacturing PCP. He challenges the district court's denial of his motion to suppress laboratory equipment and chemical supplies seized by law enforce-

ment officers during a warrantless search ostensibly conducted pursuant to a condition of his state probation. Merchant contends the district court erred in finding that he was on probation at the time of the search. We reverse.

## I. BACKGROUND

On November 14, 1980, Merchant was convicted in state court on two counts of brandishing firearms in violation of Cal. Penal Code §§ 417, 417B (West 1982). The state court suspended imposition of sentence and placed Merchant on three years probation. As a condition of probation, Merchant was required to serve eighteen months in jail, twelve months suspended. The court also conditioned Merchant's probation on his consent to searches by probation or law enforcement officers and on the requirement that he not possess any weapons.

Merchant protested the jail detention as unduly harsh, and after some discussion, Merchant's counsel stated his intention to appeal. The court granted a stay of the sentence pending the outcome of Merchant's appeal. No probation officer was ever assigned to Merchant's case.

On February 11, 1981, the assistant district attorney who prosecuted the state action moved for a clarification or modification of the stay. On February 27, the sentencing judge granted the prosecution's motion, stating, "[D]efendant will be reinstated on the terms of probation." Merchant was not present at the hearing. His counsel was present but did not object to the motion.

Four days later, the assistant district attorney and nine state law enforcement officers went to Merchant's

home to execute a civil judgment and conduct a probation search. When the officers arrived, Merchant protested that he was not on probation and would not give permission to search. The officers permitted Merchant to phone his attorney, who told the assistant district attorney that Merchant had not received notice of the sentencing judge's February 27 order.

Despite the protests of Merchant and his attorney, the officers conducted a thorough search of the residence. They found over eighty firearms. They also found chemical equipment and supplies for manufacturing phencyclidine ("PCP"). At this point, the officers halted the search and obtained a telephonic search warrant. Thereafter, the officers found other evidence of PCP manufacturing.

Based on the evidence obtained in the search, a federal grand jury indicted Merchant for manufacturing PCP, 21 U.S.C. § 841(a)(1) (1982), possessing PCC[1] with intent to manufacture PCP, 21 U.S.C. § 841(b)(1)(B)(5), and possessing piperidine with intent to manufacture PCP, 21 U.S.C. § 841(d).

Merchant moved to suppress the PCP evidence seized in the search of his house. After an evidentiary hearing, the district court denied the motion, finding that Merchant was on probation at the time of the search and had been on probation since November 14, 1980. Alternatively, the court held that even if Merchant was not on probation, the officers' reasonable good faith belief that Merchant was subject to a probation search precluded the application of the exclusionary rule.

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[1] "PCC" is an abbreviation for 1-piperidinocyclohexanecarbonitrile, a Schedule II controlled substance. *See* 21 C.F.R. § 1308.12(f)(2) (1984).

Merchant was tried on stipulated facts on the manufacturing PCP count, found guilty, and sentenced to ten years imprisonment, a special parole term of seven years, and a $25,000 fine.

## II. DISCUSSION

### *A. Merchant's Probation*

Whether Merchant was on probation when the state officers searched his house turns on whether the state court judge stayed the entire sentencing order or only that portion imposing a jail term as a condition of probation. The district court held that Merchant had been on probation since November 14, 1980, because it found that the state judge intended to stay only the jail sentence. This issue is governed by state law. *See United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983) (validity of state probation condition is governed by state law).

In its November 14 order, the state court sentenced Merchant to a three-year prison term, suspended; a three-year term of probation, effective immediately; and a six-month jail term,[2] as a condition of probation.[3] At that hearing, Merchant and his

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[2] Under California law, when jail detention is ordered as a condition of probation, the jail term is not regarded as a sentence in itself, but rather as part of the supervised effort towards rehabilitation. *Petersen v. Dunbar*, 355 F.2d 800, 802 (9th Cir. 1966); *In re Kennick*, 128 Cal. App. 2d 959, 963, 180 Cal. Rptr. 731 (1982).

[3] The sentence was as follows:

> THE COURT: Well, I am going to impose sentence at this time. I am going to place the Defendant on three years of formal probation. As a condition of probation Defendant is to—will receive a one year jail sentence for

attorney protested the probation order as unduly harsh. Merchant's attorney stated, "What I would like to do, your Honor, I do feel strongly about the second count so I would like to file a Notice of Appeal, if I could at this time." The trial judge responded, "Yes. The sentence will be stayed pending your appeal."

The government contends that when Merchant's attorney referred to the "second count," he was indicating his intention to appeal only the six-month jail confinement, and when the judge responded that the sentence would be stayed, he too was referring only to the jail term. In light of *In re Kennick*, 128 Cal. App. 3d 959, 180 Cal. Rptr. 731 (1982), we disagree.

In *Kennick*, the California Court of Appeal held that a stay of execution of a judgment stays the entire judgment, unless the trial court specifies otherwise. 128 Cal. App. 3d at 963. That case, like the one before us, involved whether a trial judge had stayed both probation and a jail term or only the latter. The court concluded that an intention to stay the jail term by itself cannot be assumed; there must be

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violation of 417(b) of the Penal Code. That sentence will be suspended. The Court will impose a jail sentence of six months on the violation of Section 417 which sentence is to be served as a condition of probation which means there will be a total of eighteen months and twelve months will be suspended. One of the conditions of probation will be that the Defendant submit his person, residence or vehicle to search and seizure at any time of the day or night by a peace officer with or without a warrant. As having in the probation report [sic] to participate in a counseling program as directed by the Probation Officer and not to possess any firearms during the period of probation.

"a specific statement of the trial court to that effect." *Id.*

We do not find any such specific statement in the record before us. The trial judge stayed "the sentence;" we cannot speculate that he meant to stay only the jail term. Moreover, at no time from the November 14 hearing to the date of the search was Merchant ever assigned a probation officer or required to report to one. And finally, when the state court granted the prosecution's motion for modification or clarification of Merchant's probation terms it stated that it was "reinstat[ing]" the probation, and not that it had been in effect all along.

These facts, viewed in light of *Kennick*, compel us to conclude that the probationary terms did not go into effect at the November 14 sentencing. The district court's conclusion to the contrary was error.

We next consider the effect of the state court's February 27 order. The court's stay of execution divested it of jurisdiction to modify the judgment during the pendency of the appeal. *Kennick*, 128 Cal. App. 3d at 692, but did not divest it of jurisdiction to revoke the stay of execution, *Stuart v. Superior Court*, 94 Cal. App. 3d 182, 184-85, 156 Cal. Rptr. 289, 291 (1979). However, the court's attempt to modify the stay was ineffective because Merchant was not given adequate notice.

When the assistant district attorney moved for a modification or clarification of the probation terms, she notified Merchant's attorney, but did not notify Merchant. At the motion hearing, Merchant's attorney was present, but Merchant was not. No waiver of his presence appears in the record. The motion argument occurred on a Friday and the search was conducted just four days later, on Tuesday. During

the interim, the assistant district attorney apparently did not make any effort to contact Merchant, and Merchant's attorney did not contact him either. Merchant had no idea that his probation had been "reinstated" or that he was subject to a warrantless search until the officers arrived at his door.

Notice is perhaps the most fundamental of due process rights. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (notice is one of the "minimum requirements of due process"); *Groppi v. Leslie*, 404 U.S. 496, 502 (1972); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *see also Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."). The principle of adequate notice is interwoven throughout our system of criminal justice. It applies at all stages of a criminal prosecution, from institution of criminal proceedings, *see, e.g., Salinas v. United States*, 277 F.2d 914, 916 (9th Cir. 1960) (due process requires that an indictment be sufficiently clear to apprise accused of the crime charged), to sentencing, *see, e.g., Gardner v. Florida*, 430 U.S. 349, 358, 362 (1977) (plurality opinion) (denial of due process to sentence defendant to death on basis of presentence report he was not allowed to see).

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Supreme Court held that the loss of liberty entailed in a probation revocation hearing is a serious deprivation requiring that the probationer be accorded due process protections. *Id.* at 781-82. Although a probationer is not entitled to the full panoply of trial-type protections, he is entitled to a preliminary probable

cause hearing and a more comprehensive final revocation hearing. *Id.* at 786. The probationer must be given notice of each hearing and an opportunity to be heard at each. *Id.*

Several other circuits have concluded, however, that *Gagnon* does not apply in the context of a proceeding to extend probation. These courts have held that the liberty interest at stake in an extension proceeding is less significant than in a revocation proceeding, and, therefore, a preextension hearing is not a constitutionally mandated right. *See, e.g., Forgues v. United States*, 636 F.2d 1125, 1127 (6th Cir. 1980) (per curiam); *United States v. Cornwell*, 625 F.2d 686, 688 (5th Cir.), *cert. denied*, 449 U.S. 1066 (1980); *United States v. Carey*, 565 F.2d 545, 547 (8th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 953 (1978); *Skipworth v. United States*, 508 F.2d 598, 601 (3d Cir. 1975).[4]

We deal here with neither a revocation nor an extension of probation, but with what amounted to an initial imposition of probation. The liberty interests at stake here are not as significant as those involved in a revocation proceeding, for the February 27 order did not make Merchant immediately subject to incarceration. But they are considerably more significant than those involved in an extension proceeding, for Merchant was not subject to *any* restrictions on his liberty prior to the court's order.

The terms of Merchant's probation imposed substantial burdens on his fourth amendment rights to be free from unreasonable searches and seizures. The

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[4] However, in three of these four cases, the courts, under their supervisory powers required notice and hearings for all future extensions of probation. *Forgues*, 636 F.2d at 1127; *Cornwell*, 625 F.2d at 689; *Skipworth*, 508 F.2d at 602-03.

terms of probation required Merchant to submit to searches at any time, by any law enforcement officer, with or without probable cause. Such terms impose a substantial burden on a fundamental right. This was a sufficient intrusion upon Merchant's liberty to require that he be given notice.

We find support for our conclusion in *Wheeler v. United States*, 640 F.2d 1116 (9th Cir. 1981). There, the trial court issued an order restricting Wheeler's correspondence privileges in prison, in order to protect several trial witnesses from harrassment. Wheeler was not notified that the order had been sought, was not present when the court issued the order, and was not formally notified of the order until four years after it was issued. *Id.* at 1118. This court concluded that the order imposed a substantial burden on Wheeler's first amendment rights, and, therefore, due process required that "[u]nless the circumstances were unusually compelling, the trial court should have held a hearing, with prior notice to Wheeler, before it issued the order." *Id.* at 1122 (footnote omitted).

The government contends that because Merchant's attorney was present at the February 27 hearing, "it was certainly reasonable . . . to infer that [Merchant] was aware" of the court's order before the search was conducted. We cannot be satisfied with inference of notice; we must have proof of it. Merchant's counsel admits that he did not notify Merchant. Nor does the government assert that state authorities made any efforts to notify Merchant directly.

The right to notice under the fifth and sixth amendments is personal to the defendant. *See Faretta v. California*, 422 U.S. 806, 819 (1975); *cf. Wheeler*, 640 F.2d at 1118 & n.3, 1122-23 (notice and hearing required before prisoner's correspondence privileges restricted even though prisoner probably was aware

of restriction shortly after it was imposed). Moreover, a defendant has a constitutional right to be present at all stages of a criminal proceeding against him. *See Bustamonte v. Eyman*, 456 F.2d 269, 272-73 (9th Cir. 1972). This right is protected by rule in federal courts, Fed. R. Crim. P. 43, and by statute in California, Cal. Penal Code § 1043 (West 1970 & 1984 Supp.). Merchant was not present at the February 27 hearing, the record does not show any waiver, and the court did not even inquire about his absence. Notice to and the presence of Merchant's attorney does not suffice.[5]

Finally, we find no reasons why Merchant could not have been notified of the motion or the February 27 hearing. Merchant had not absconded after the initial sentencing: the state authorities knew exactly where he was. The state could have contacted Merchant to tell him of the court's order, or could have postponed the search until it could be sure that Merchant had received notice from the court.

On the facts before us we conclude that Merchant was not on probation on March 3, when the state authorities arrived to search his home. The absence of notice to Merchant renders the February 27 order a nullity.

B. *Reasonableness of Officers' Conduct*

The district court alternatively held that even if Merchant was not subject to probation on March 3,

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[5] We need not decide whether Merchant's presence was required at the February 27 hearing, because we decide that the failure to give him notice of that hearing invalidated the order. We allude to the constitutional right of a defendant to be present at proceedings against him as support for our conclusion that the defendant, not merely his counsel, must be given notice.

the search conducted on that date was still valid because the state authorities relied in good faith on the state court's February 27 order. We disagree.

The Supreme Court established the so-called "good faith" exception to the exclusionary rule in *United States v. Leon*, 104 S. Ct. 3405 (1984). *Leon* held that a court should admit all evidence obtained by an officer acting in reasonable reliance on a search warrant [6] issued by a neutral and detached magistrate. The standard is *objective reasonableness*; subjective good faith is not enough. *Id.* at 3421 & n.23.[7] Applying de novo review, *United States v. Hendricks*, 743 F.2d 653, 656 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1362 (1985), we conclude that the officers' conduct in the present case was not objectively reasonable.

The facts show that none of the law enforcement officers reasonably could have believed that the search

---

[6] In this case, the initial entry and search were warrantless. In analyzing this case under *Leon*, we do not suggest that the "good faith" exception applies beyond the warrant context. Courts have rejected extension of the good faith rule to warrantless searches. *See, e.g., United States v. Morgan*, 743 F.2d 1158, 1165 (6th Cir. 1984); *United States v. Rule*, 594 F. Supp. 1223, 1238-39 (D. Maine 1984); *see also* Note, *Leading Cases of the 1983 Term*, 98 Harv. L. Rev. 87, 115-18 (1984). Because we decide here that the state authorities' conduct was not objectively reasonable, the evidence should be suppressed regardless of whether a *Leon* good-faith analysis is applicable.

[7] *Leon* has been applied retroactively in this circuit, albeit without discussion of the retroactivity issue. *United States v. Hendricks*, 743 F.2d at 653, 656 (9th Cir. 1984). The Eighth Circuit has considered the issue and expressly decided that *Leon* should be given retroactive effect. *United States v. Sager*, 743 F.2d 1261, 1263-65 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1196 (1985).

related to the interests of effective probation supervision. *See United States v. Johnson*, 722 F.2d 525, 528 (9th Cir. 1983). There is no showing that the state ever made any efforts toward rehabilitating Merchant. He did not receive supervision or counseling. In fact, he was never even assigned a probation officer.

The search was conducted because the assistant district attorney had received reports of gunfire on Merchant's property. After receiving the reports, she did not contact the probation department but instead filed the motion for clarification or modification of Merchant's probation. She did not inform the court of Merchant's suspected activity, nor of her earlier conversations with law enforcement officers about conducting a search of Merchant's residence if the probation search condition was in effect.[8] The search was hastily organized shortly after the order was issued.

These facts strongly suggest that the search was a subterfuge for conducting a criminal investigation. We have condemned the practice of using a search condition imposed on a probationer as a broad tool for law enforcement. *See Johnson*, 722 F.2d at 527; *Latta v. Fitzharris*, 521 F.2d 246, 251-52 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975); *cf. United States v. Jarrad*, 754 F.2d 1451, 1453-54 (9th Cir. 1985) (parole search upheld because parole officer was not acting as a "stalking horse" for police

---

[8] In the absence of an assigned probation officer, it was the sentencing judge who retained the power to require supervision of the probationer, to punish violations of the conditions, and to revoke probation. *In re Osslo*, 51 Cal. 2d 371, 334 P.2d 1 (1958).

investigation). Because the search here clearly was not a genuine attempt to enforce probation but apparently had a motive of avoidance of Fourth Amendment requirements, it is the type of law enforcement conduct that ought to be deterred. Consequently, the exclusionary rule applies with full force. *See Leon*, 104 S.Ct. at 3419.[9] Therefore, the laboratory equipment and chemical supplies seized during the search must be suppressed.[10]

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[9] The government additionally argues that two California cases, *People v. Washington*, 131 Cal. App. 3d 434, 186 Cal. Rptr. 3 (1982), and *People v. Tellez*, 128 Cal. App. 3d 876, *modified on other grounds*, 129 Cal. App. 3d 722, 180 Cal. Rptr. 579 (1982), support their argument that the conduct in this case falls within the good faith exception to the exclusionary rule. We disagree.

In *Tellez* and *Washington*, officers conducted probation searches after the probations had ended, but believing that they were still in effect. The courts admitted the evidence seized on the basis that the officers reasonably had relied on representations of probation officers and of the probationers themselves that the probations were still in effect.

We have a different situation. Merchant and his attorney loudly protested that probation was not in effect. Merchant had *never* been on probation and he had no reason to believe that he was on probation on March 3. The state authorities not only took no steps to notify Merchant of the "reconsideration" of his probation or the "reinstatement" order, they engineered the "reinstatement" in order to conduct the search.

[10] The government has admitted that the search warrant, secured after the initial warrantless entry, was premised on information obtained as a result of the initial entry. Therefore, the evidence seized pursuant to the warrant was a "fruit" of the original illegality, and *all* the evidence must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

## III. CONCLUSION

We conclude that Merchant was not on probation on March 3 when the state officers came to search his house because he was not given notice of the February 27 hearing at which his probation ostensibly was "reinstated." Additionally, we conclude that the officers' conduct was not objectively reasonable. Therefore, the evidence seized in the search must be suppressed.[11]

REVERSED.

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[11] We need not reach Merchant's alternative argument, that the consent to search clause of his probation violates the fourth amendment.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

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CR No. 81-0109 SW (SJ)

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

WILLIAM DAVIDSON MERCHANT
and CLEO L. MAROHN, DEFENDANTS

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[Filed Oct. 28, 1981]

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## ORDER DENYING DEFENDANTS' MOTION TO SUPPRESS

Defendants' motion to suppress contests the validity of a warrantless search of their residence on March 3, 1981 as well as other subsequent searches of their property and belongings. The government claims that the search was valid under the terms of probation imposed on defendant Merchant in a prior state proceeding. In addition, they claim they had authority to enter the residence to execute a civil levy in connection with prior judgment held against defendant Merchant. An evidentiary hearing on this matter was held on October 20, 1981. For the reasons outlined below, the court hereby denies defendants' motion.

I

In 1980, defendant Merchant was convicted on two counts of brandishing firearms. As to count one, the court imposed a one year suspended sentence. As to count two, the court imposed a six month jail term. In addition, defendant Merchant was placed on three years probation on the condition that he "submit his person, residence or vehicle to search and seizure at any time of the day or night by a peace officer with or without a warrant."

At the sentencing hearing held on November 14, 1980 defendant claimed that a jail sentence would cause him severe financial hardship. While fearful of the potential danger defendant posed to the public, it appears the court was willing to stay imposition of the jail term to give defendant a chance to enter a work furlough program. In addition, it appears that the court stayed the sentence pending defendant's appeal of the conviction on the second count. The main dispute between the parties is whether the stay applied to the jail sentence alone or to both the jail sentence and the probation.

Between the date of the sentencing hearing and February 1981, the authorities received a number of reports concerning possible probation violations at defendant Merchant's residence. In February, the District Attorney filed a Motion for Clarification/Modification of the sentencing to prevent any disagreement over whether defendant Merchant was under probation. At the hearing held on the motion, defendant Merchant did not appear, but his attorney, Mr. Foster did. Mr. Foster did not object to the motion and the court therefore granted it.

Five days later, the authorities conducted the search of defendants' residence. A number of guns

were found at the residence, in violation of the terms of the probation. In addition, during this and subsequent searches, the police seized a number of illicit drugs and drug manufacturing supplies and equipment.

II

The court disagrees with the arguments of defendants and finds that the stay originally granted applied only to the count carrying the jail sentence. A reading of the entire transcript from the sentencing hearing makes this abundantly clear. The trial court judge was obviously deeply concerned about the potential danger defendant Merchant posed. He wanted to ensure that Merchant would not have access to guns in the near future. The stay of the jail term was granted only because of the immediate economic hardship it might pose to the defendant and so the second count of the conviction could be appealed. In addition, the record clearly indicates that the defendant and his lawyer, Mr. Foster were concerned only with an immediate stay of the jail sentence. There was no objection to the term or conditions of the probation.

The fact that the District Attorney sought a clarification or modification of the sentence does not change what happened at the hearing. Whether the judge felt he was clarifying or modifying the sentence imposed is admittedly not entirely clear from the brief transcript of the hearing. This lack of clarity is simply not enough, however, to challenge the conclusion that defendant Merchant was under probation from November 14th on. Since the court finds that probation for defendant Merchant began in November, it need not address the question of whether his absence from the February 27th hearing nullifies that proceeding.

Assuming *arguendo* that defendant was not under the terms of the probation at the time of the search, it is clear that at least from February 27th on, the law enforcement personnel involved and, for that matter, defendant's attorney Mr. Foster, all held a good faith belief that they had the authority to make a warrantless search of defendant's residence based on the trial court's ruling on the motion for clarification or modification. A number of recent cases hold that the exclusionary rule does not apply where evidence "is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken belief that they are authorized." *United States v. Williams*, 622 F.2d 830, 840 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 946 (1981). Under this standard then, defendants' motion to suppress would be defeated.

III

The court therefore denies defendants' motion in so far as it applies to the initial search of defendants' residence. The court also finds that the subsequent searches of defendants' residence and other property conformed to the requirements of the Fourth Amendment and are therefore not subject to the Exclusionary Rule.

For the reasons given, and for the good cause appearing, IT IS HEREBY ORDERED that defendants' motion to suppress be DENIED.

DATED: 10-28-81

/s/ Spencer Williams
United States District Judge

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 83-1135

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*vs.*

DAVID WILLIAM MERCHANT, DEFENDANT-APPELLANT

---

[Filed Jan. 13, 1986]

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ORDER

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Before: MERRILL, FLETCHER and CANBY, Circuit Judges

The panel in this case voted to deny the petition for rehearing, and to deny the petition for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 83-1135

DC No. Cr 81-109-1 SW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*vs.*

WILLIAM DAVIDSON MERCHANT,
DEFENDANT-APPELLANT

---

[Filed May 14, 1985]

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JUDGMENT

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Appeal from the United States District Court
for the Northern District of California (San Jose)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Jose) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Reversed.

Filed and entered May 14, 1985.

**APPENDIX E**

MUNICIPAL COURT OF THE
SANTA CRUZ COUNTY
JUDICIAL DISTRICT
COUNTY OF SANTA CRUZ,
STATE OF CALIFORNIA

---

No. ———

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

*vs.*

DAVID WILLIAM MERCHANT, DEFENDANT

---

REPORTER'S TRANSCRIPT OF PROCEEDINGS
COURTHOUSE ANNEX,
WATSONVILLE, CALIFORNIA
FEBRUARY 27, 1981
BEFORE THE
HONORABLE JOHN A. MARLO, JUDGE

APPEARANCES

For the People:

PATRICIA BAZAR, ESQ.,
Deputy District Attorney

For the Defendant:

SAMUEL FOSTER, ESQ.,
Attorney at Law

Reported by:

CORINNE M. KAITZ
Shorthand Reporter

Case No. CR 15714

Watsonville, California February 27, 1981

PROCEEDINGS

THE COURT: David Merchant, CR 15714. Mr. Foster is present. The Defendant is not present.

MR. FOSTER: I would state that I do agree on the first count. My appeal is very weak and I would agree that the motion is well taken as far as probation is concerned.

THE COURT: Court will grant the motion for clarification. Defendant will be reinstated on the terms of probation.

MS. BAZAR: Including no guns?

THE COURT: The entire probation order that he signed.

MS. BAZAR: Fine, Your Honor.

THE COURT: He doesn't have to report for confinement yet.

---

COUNTY OF SANTA CRUZ )
) ss.
STATE OF CALIFORNIA )

I, CORINNE M. KAITZ, a Shorthand Reporter in and for the State of California, do hereby certify:

That I am the Reporter, duly appointed and sworn who reported the above and foregoing proceedings in the matter entitled PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. DAVID WILLIAM MERCHANT, Defendant, at the time and place first therein mentioned:

That I reported said proceedings fully and correctly, to the best of my ability, and the foregoing pages numbered 1 to 2, inclusive, are a full, true, complete and correct transcription of my shorthand notes taken at said time and place, prepared under my direction and supervision; and that the said pages constitute a full, true, complete and correct statement of said proceedings then and there had.

Dated this —— day of March, 1981.

CORINNE M. KAITZ
Shorthand Reporter

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No. 85-1672

Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
# Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,

*Petitioner,*

v.

WILLIAM D. MERCHANT,

*Respondent.*

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a defendant's rights to due process and to be free of unreasonable searches and seizures are violated by a warrantless search conducted pursuant to a probation condition, that was imposed in his absence, without his knowledge, and without his consent.

2. Whether the "good faith" exception to the Fourth Amendment exclusionary rule should be expanded beyond the warrant context and should apply to law enforcement officers' purported reliance on a search clause in a defective probationary order which the officers knew was entered without notice to the defendant.

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## STATEMENT

An elaboration and clarification of several matters will assist the Court's consideration of the issues raised by the Petition.

1. a. Contrary to petitioner's assertion (Pet. at 4), respondent never accepted or consented to the terms of his probation. At the misdemeanor sentencing hearing on November 14, 1980, the Municipal Court articulated several conditions of probation and then announced that the "sentence will be stayed pending your appeal" (Pet. App., 4a-5a), but never inquired whether respondent consented to those conditions. Similarly, the form which respondent signed at the conclusion of the hearing called for respondent's acknowledgement that he had "read and understood the . . . conditions of probation" (E. R. 119; GX G-2-A; see, 5/21/81 Tr. 21), but nowhere did respondent manifest his consent to those terms.[1] Indeed, respondent knew that the trial court had already issued the oral order staying his sentence when he signed the document. (5/21/81 Tr. 129-130.)

b. The probation form which bears respondent's signature expressly required his formal supervision by a probation officer, who could direct petitioner to under-

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[1]Petitioner inaccurately refers to a second document as the Municipal Court's "judgment." (Pet. at 4, n. 4.) The state prosecutor previously described that document which does not bear the judge's signature, as a "confinement form." (5/21/81 Tr. 127.) Moreover, although the District Court indicated it would take judicial notice that the document was "the formal sentencing document", it was never moved or received into evidence and is not a part of the record in this case. (5/21/81 Tr. iv, 128.)

go counseling. (E.R. 119; GX G-2-A.) Similarly, the Municipal Court's oral statements expressly contemplated that when respondent's probation began he would be supervised by a probation officer. (Pet. App. 4a-5a, note 3.) However, respondent was never assigned to nor referred to a probation officer; and respondent never reported to one.

2. a. The local prosecutor testified that she received complaints of gun fire occurring on respondent's property in early to mid-January, and learned of another incident allegedly involving a threat by respondent in early February. (5/21/81 Tr. 97-100.) Although she professed concern that respondent had violated the terms of his probation (5/21/81 Tr. 100-101), the prosecutor took no steps to ensure that respondent was assigned to a probation officer or received supervision. Instead, on February 11, 1981, the prosecutor filed a motion for "Clarification and/or Modification of Stay of Judgment" with the intention of conducting a warrantless search of respondent's residence as soon as possible after the motion was granted. (5/21/81 Tr. 114; 4/30/81 Tr. 187).

b. This motion was heard by the Municipal Court on February 27, 1981. (Pet. App. 2a.) Notice of the motion had been served on respondent's counsel who appeared at the hearing. (5/21/81 Tr. 5.) However, it is undisputed that counsel had failed to inform respondent of either the motion or the hearing. (5/21/81 Tr. 5.) Although the Municipal Court noted respondent's absence, it made no inquiry concerning respondent's waiver of his right to be present or of counsel's authority to act on behalf of respondent in his absence. (Pet. App. 22a.) Without objection from respondent's counsel, the Municipal Court

granted the motion and stated that respondent would "be *reinstated* on the terms of probation." (Emphasis added.) (*Ibid.*)

c. At the time of the hearing on the motion for clarification/modification the local prosecutor informed neither the Municipal Court judge nor defense counsel of her intention to conduct a warrantless search of respondent's residence as soon as possible after the motion was granted. (Pet. App. 12a.)

3. a. Shortly after the hearing on February 27, the prosecuting attorney informed an investigator in her office that the motion had been granted and told him that "I want a search . . . . " (4/30/81 Tr. 189; 5/21/81 Tr. 41.) However, because of manpower difficulties, a search party could not be assembled until March 3, 1981, four days later. (5/21/81 Tr. 41-42.)

b. Also on February 27, respondent's counsel wrote a letter to respondent informing him of the prosecutor's motion for the first time and alerting respondent that his probation was now in effect. (5/21/81 Tr. 23-24.) However, the letter was later returned to counsel unopened and respondent remained unaware of the court's order until nine armed police officers, led by the prosecuting attorney, arrived at his residence prepared to forcibly enter and search. (*Id.* at 5-9.)

c. The search party arrived at the premises at approximately 11:00 a.m. on Tuesday, March 3, 1981. (5/21/81 Tr. 29.) Included in its number were several local police officers, including representatives from narcotics enforcement, as well as the prosecuting attorney who had filed the motion to modify respondent's probation status

in order to be able to enter respondent's home without a warrant. (5/21/81 Tr. 102; 138.) Upon the group's arrival at respondent's door, respondent insisted that he was not on probation and refused them entry. (*Id.* at 29-31.) Respondent then requested and was permitted to call his attorney, who spoke to the prosecutor and confirmed that respondent had not yet been informed of the February 27th order subjecting him to the terms of probation. (5/21/81 Tr. 10, 31-32, 121-122; 4/30/81 Tr. 197.)

d. Following his conversation with the prosecutor, respondent's counsel telephoned the Municipal Court judge who had presided at the February 27th hearing. (5/21/81 Tr. 10.) Judge MARLO then telephoned the prosecuting attorney at respondent's residence to discuss the situation. (4/30/81 Tr. 199; 5/21/81 Tr. 121.) Having been informed for the first time that respondent had never received notice of the February 27th proceedings and remained unaware of the Court's order until the arrival of the search party, Judge MARLO told the prosecutor:

> . . . on more than one occasion . . . well, don't, don't take this conversation to mean that I have any opinion as to whether you should or shouldn't be doing what your doing.
>
> (4/30/81 Tr. 200.)

e. Despite these conversations, the prosecuting attorney eventually determined that the search should begin. (4/30/81 Tr. 198.) Ultimately, the search produced the contraband, chemicals, and laboratory equipment which underlay the charges that were filed against respondent in the District Court. (Pet. at 6.)

4. On the basis of the evidence discovered during the March 3, 1981 search, the Municipal Court revoked

respondent's probation. Subsequently, however, the Superior Court appellate division reversed that decision on the grounds that respondent could not be bound by probation conditions which went into effect without his knowledge.

> Due process and elementary considerations of fairness preclude revocation of probation and imposition of a jail sentence unless the defendant had theretofore been unequivocally apprised of his probation status.
>
> (E.R. 118.)

5. In denying respondent's motion to suppress, the United States District Court held that respondent's probation was in effect from the date of his sentencing on the misdemeanor offenses — i.e. November 14, 1980. (Pet. App. 17a.)[2] Alternatively, the District Court held that even if respondent was not on probation, the suppression remedy was inappropriate because the officers who executed the search had reasonably relied on the probation order. (Pet.App. 18a)

6. a. In reversing, the Ninth Circuit Court of Appeals first recognized that the question whether respondent was subject to the conditions of probation (and hence to the search clause) at the time of the March 3rd search is governed by state law, subject only to the minimum protections offorded by the federal constitution. (Pet. App. 4a.) The court next determined that under state law, respondent's entire probationary sentence was stayed because the sentencing Municipal Court judge did not specify

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[2]This holding made it unnecessary for the District Court to concern itself with the legal significance of the February 27th order, and the court did not in fact address that issue.

otherwise. (Pet.App. 5a-6a.)[3] Significantly, petitioner does not seek review from this Court of either of these holdings.

b. The Court of Appeals next considered the effect of the February 27th order. (Pet.App. 6a-10a.) Given the Court of Appeals' prior holding that respondent was not on probation prior to that date, it followed that the Municipal Court's order vacating the stay constituted "an initial imposition of probation." (Pet.App. 8a.) Because the effect of that order was to impose substantial burdens on respondent's liberty and fundamental rights, the Court of Appeals held that federal due process was violated by the absence of any notice to respondent concerning the February 27th proceedings or order. (Pet.App. 8a-10a.) This aspect of its decision was supported, the Court of Appeals noted, by the fact that respondent's state and federal rights to be present at all stages of the proceedings had also been truncated by the Municipal Court's action. (Pet.App. 10a.) Finally, the Court of Appeals emphasized that the emasculation of respondent's rights in the Municipal Court proceedings was compounded by the decision of the state authorities not to "postpone [ ] the search until it could be sure that [respondent] had received notice [of the order] from the court." (Pet. App. 10a.)

c. The Court of Appeals also rejected the contention that the suppression remedy should not be invoked because of the executing officers' purported good faith reliance on the search clause of the probation order. (Pet.

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[3]The Court of Appeals determined that this conclusion was compelled by *In re Kennick*, 128 Cal.App.3d 959, 963, 180 Cal. Rptr. 731, 733 (1982).

App. 10a-13a.) Assuming without deciding that the rationale of the *United States v. Leon*, — U.S. —, 104 S. Ct. 3405 (1984) might apply outside the warrant context, the Court of Appeals ruled that the suppression remedy was nevertheless mandated because "the state authorities' conduct was not objectively reasonable." (Pet. App. 11a, n. 6.) In reaching this conclusion, the Court of Appeals emphasized the single-mindedness with which the state authorities had engineered the "reinstatement" of respondent's probation and had then hastily organized a search despite their knowledge that respondent had received no notice that his probation had been "reinstated," and was consequently unaware that the probationary terms which the authorities suspected him of violating were then in effect.[4] The Court of Appeals concluded that the authorities' zealous determination to investigate suspected probation violations which they knew had occurred prior to the probation's "reinstatement," rendered their motives for the search suspect and their conduct objectively unreasonable. (Pet.App. 12a-13a.)

7. a. Following the Court of Appeals' decision, the government filed a petition for rehearing with a suggestion for *en banc* review. Said petition was reviewed by the entire court, but not a single judge requested a vote. (Pet App. 19a.)

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[4]As the Court of Appeals noted, the state authorities determined to conduct the search while knowing that respondent had received no supervision or counseling, had not been referred to probation officer, and that no other efforts towards the rehabilitation of respondent or the protection of society had been made. (Pet.App. 12a.)

## REASONS FOR DENYING THE WRIT

The petition raises no issues which merit a writ of certiorari. Because probation was imposed upon respondent in proceedings that were deficient under both state and federal law, the validity of the probation order does not raise an important question of federal law. Similarly, the good faith exception to the exclusionary rule is inapposite, both because it should not be applied to advance-consent searches and because the unique facts of this case establish that the conduct of the officers was not objectively reasonable.

1. a. The first issue raised in the Petiton—i.e., the due process notice question—is framed too broadly and too narrowly, both at the same time. The issue is stated too broadly because the question is not merely whether a defendant must receive actual notice "of a scheduled hearing," but whether an individual may be validly subjected to the terms and conditions of probation (and thereby deprived of several fundamental rights) without his knowledge. On the other hand, the issue is framed too narrowly because the Court of Appeals' holding rests not only on the notice problem, but also on the deprivation of other fundamental procedural rights under both state and federal law. Indeed, as will be seen, the Court of Appeals' decision on the probation question was compelled by independent state grounds.

b. California courts have adopted a contractual theory for the imposition of probation: in exchange for a less harsh sentence, the defendant may accept those restrictions of his rights which are inherent in the probationary conditions. *People v. Mason*, 5 Cal.3d 759, 763-

764, 488 P.2d 630, 632, 97 Cal.Rptr. 302, 304-305 (1971), *cert. denied*, 405 U.S. 1016 (1972);[5] *In re Bushman*, 1 Cal. 3d 767, 776-777, 463 P.2d 727, 733, 83 Cal.Rptr. 375, 381 (1970). Consistent with this approach, a defendant in the state's courts "has the right to refuse probation, a right of which he cannot lightly be deprived." *In re Osslo*, 51 Cal.2d 371, 377, 334 P.2d 1, 5 (1958). Moreover, a defendant who appeals his conviction need not manifest such refusal at the sentencing hearing, but may wait instead until the appeal is finally resolved:

> [W]hatever may be within the trial court's permissible scope of conditions for *granting* probation it could not make petitioners' right to *reject* the offer of probation conditional upon their immediate announcement of rejection.
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> *In re Osslo, supra*, 51 Cal.2d at 382, 334 P.2d at 8 (emphasis in original).[6]

It is true, as petitioner points out, that the waiver of Fourth Amendment rights in appropriate cases is a probationary condition which California courts may validly impose. (Pet. at 19-20 and n. 13). Nevertheless, the state courts "jealously guard" against the wholesale or unwitting relinquishment of such fundamental rights and "indulge every reasonable presumption against waiver . . . ."

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[5]*Mason* was disapproved on other grounds in *People v. Lent*, 15 Cal.3d 481, 541 P.2d 545, 124 Cal.Rptr. 905 (1975).

[6]In *Osslo*, the California Supreme Court held that the petitioners could not be denied the right to reject probation and demand sentence following the final determination of their appeal, even though their sentences had not been stayed pending appeal. 51 Cal.2d at 382-383, 334 P.2d at 8. Here, of course, respondent's sentence was stayed pending appeal by the Municipal Court. (See, Opp., *supra*, at 1.)

*Blair v. Pitchess*, 5 Cal.3d 258, 274, 486 P.2d 1242, 1253, 96 Cal.Rptr. 42, 53 (1971). Thus, a waiver will not be presumed or implied;[7] and where a waiver is found, it will be strictly and narrowly construed.[8]

Applying these principles, it is clear that under California law there was no Fourth Amendment waiver in this case. Respondent was not asked at the sentencing hearing whether he consented to the probationary terms. Compare, *Freytes v. Superior Court, supra,* 60 Cal.App.3d at 962, 132 Cal.Rptr. at 29 (wherein defendant orally agreed to warrantless search condition). Nor did the written form which respondent signed at the conclusion of the hearing call for respondent's consent to the conditions. (See, Opp., *supra,* at 1.) Moreover, respondent signed that document only after he expressed his intention to appeal and the Municipal Court had stayed his sentence. Consequently, even if the signing of that document under appropriate circumstances might constitute the unequivocal consent to the probationary terms which California law requires, here it was subject to the express condition

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[7]See, *People v. Myers*, 6 Cal.3d 811, 817-818, 494 P.2d 684, 688, 100 Cal.Rptr. 612, 616-617 (1972) (defendant's status as an outpatient of a narcotics clinic did not imply waiver); *Freytes v. Superior Court*, 60 Cal.App.3d 958, 962, 132 Cal.Rptr. 26, 29 (1976) (no waiver where probation was revoked and reinstated without express reference to maintenance of the previous search condition).

[8]See, *People v. Superior Court (Stevens)*, 12 Cal.3d 858, 528 P.2d 41, 117 Cal.Rptr. 433 (1974) (consent to search "upon request" means defendant must receive advance notice of search); *People v. Bremmer*, 30 Cal.App.3d 1058, 1064, 106 Cal.Rptr. 797, 801 (1973) (probation condition permitting warrantless searches does not constitute waiver of right to be searched only upon reasonable cause).

precedent that the terms of probation would not be in effect during the pendency of respondent's appeal.[9] Hence, under state law there was no effective waiver of respondent's Fourth Amendment rights.

The Court of Appeals correctly perceived that the February 27th proceedings did not alter the situation. (Pet. App. 6a-10a.)[10] It is uncontroverted that respondent was unaware of the prosecution's motion, did not have notice of the hearing, did not appear before the Court, and did not learn of the Court's order until the time of the search. Respondent having manifested no consent to the imminent imposition of the probationary terms at the sentencing hearing three months earlier, the proceedings on February 27th clearly did not comply with the requirements that "the waiver must appear of record to have been knowingly and intelligently made." *People v. Myers, supra,* 6 Cal.3d at 819, 494 P.2d at 689, 100 Cal.Rptr. at 617. Thus, the February 27th proceedings could not validly subject respondent to the search clause.

c. This conclusion is also compelled by the decision of the Superior Court setting aside respondent's probation revocation. That court found that respondent had

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[9]Once again, the Court of Appeals' ruling that respondent's probationary terms (and hence the search clause) were stayed by the sentencing judge has not been challenged by petitioner and is therefore the law of this state.

[10]The fact that the Court of Appeals chose to base its ruling on federal due process does not alter the fact that the same result is mandated not only by California law concerning advance waivers of Fourth Amendment rights, but also (as will be seen) by the state constitutional due process clause and by respondent's state and federal constitutional rights to be present at all stages of the proceedings.

not been "unequivocally apprised of his probationary status" and therefore determined that punishing him for his failure to abide by the probationary terms would violate due process of law. (E.R. 118.)[11] A *fortiori*, due process would be similarly offended by a holding that a court could strip respondent of his fundamental Fourth Amendment rights as of a specific date without his having been "unequivocally apprised" of *that* fact. Indeed, the absence of an unambiguous statement by the Court to respondent of his *current* status as a probationer (and respondent's unequivocal assent thereto) precludes the finding of a valid waiver of respondent's Fourth Amendment rights under California law.[12]

d. Apart from the notice and waiver problems, the February 27th proceedings were also rendered fatally defective by respondent's absence. (Pet.App. at 10a.)[13]

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[11]The Superior Court did not articulate whether it was relying on the federal or state constitutional provisions. Article I, Section 15 of the California Constitution guarantees defendants in state criminal proceedings that they will enjoy due process of law.

[12]It is true, as petitioner notes, that the Superior Court included a disclaimer that its decision should not be construed as disagreement with the District Court's ruling in this case that the March 3rd search was lawful. (E.R. 118-119.) However, the lawfulness of the search was not before the Superior Court, and the state court judges cannot be faulted for failing to recognize that their determination that there was inadequate notice to respondent concerning his probationary status under state law would be binding on a federal court. (See, Opp., *supra*, at 5-6.)

[13]Although the Court of Appeals declined to decide whether respondent's absence from the February 27th proceedings rendered them invalid (Pet.App. at 10a, n. 5), the case law on this subject also mandates the result reached by the Court of Appeals.

Both the state and federal constitutions guarantee criminal defendants the right to be present at all stages of the proceedings. See, *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Olney v. Municipal Court,* 133 Cal.App.3d 455, 459, 184 Cal.Rptr. 78, 80 (1982); *People v. Kriss,* 96 Cal.App.3d 913, 916, 158 Cal.Rptr. 420, 421 (1979).[14]

At the same time, the California legislature has granted defendants in misdemeanor proceedings the right to be *absent* and to appear through counsel. See, Penal Code § 977(a). However, because exercise of this statutory right necessarily entails a waiver of the more fundamental right to be present, the California courts characterize the former as "conditional" in nature:

> A defendant who absents himself must do so with full knowledge of the pendency of the criminal proceedings, as the waiver of the right to be present must be a knowing and intelligent one.
>
> *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 460-461, 184 Cal.Rptr. at 81.

*Turner v. Municipal Court,* 131 Cal.App.3d 643, 648, 182 Cal.Rptr. 650, 652 (1982). Thus, where counsel appears without his client, the court must satisfy itself "that the acts of counsel are authorized by the absent defendant." *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 461, 184 Cal.Rptr. at 81. See also, *Mills v. Municipal Court,* 10 Cal.3d 288, 304-305, 515 P.2d 273, 285, 110 Cal.Rptr. 329 (1973); *Turner v. Municipal Court, supra,* 131 Cal.

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[14]In California, the right to be present is secured by Article 1, Section 15, of the state constitution. See, *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 459, 184 Cal.Rptr. at 80.

App.3d at 648, 182 Cal.Rptr. at 652; *People v. Kriss, supra,* 96 Cal.App.3d at 917, 158 Cal.Rptr. at 422.[15]

In this case the record establishes that respondent was not present at the February 27th hearing, that the Municipal Court noted respondent's absence but did not inquire concerning counsel's authority, and that a waiver of respondent's right to be present was not otherwise shown. Indeed, the uncontroverted evidence demonstrates that respondent was completely unaware of the proceedings, thereby precluding a finding that he was "knowingly" absent and had authorized the acts of counsel. Accordingly, under California law, respondent's constitutional right to be present was violated by the February 27th proceedings.

Moreover, prejudice to respondent was manifest in the conduct of those proceedings in his absence and without proper inquiry by the court.[16] First, as previously

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[15]Pragmatically, California's courts permit reliance upon defense counsel's representations that his client is knowingly absent and has authorized counsel to act on his behalf. *Olney v. v. Municipal Court, supra,* 133 Cal.App.3d at 461, n. 5, 184 Cal.Rptr. at 81; *People v. Singer,* 115 Cal.App.3d Supp. 7, 11, 171 Cal.Rptr. 587, 589 (1981). However, the case law affirmatively rejects petitioner's contentions that "notice to counsel is considered notice to the client. . . ." and that the Municipal Court was justified in assuming proper notice to and waiver by respondent from the appearance of his counsel at the hearing. See, e.g., *Turner v. Municipal Court, supra,* 131 Cal.App.3d at 648, 182 Cal.Rptr. at 652. (Compare, Pet. at 14.)

[16]An order issued in violation of a defendant's state constitutional right to be present cannot stand if the defendant was prejudiced by it. *People v. Kriss, supra,* 96 Cal.App.3d at 920, 158 Cal.Rptr. at 424; *People v. Williams,* 10 Cal.App.3d 745, 749-752, 89 Cal.Rptr. 364, 366-368 (1970).

demonstrated, the defective procedure ignored the requirement of California law that respondent expressly consent to imposition of the terms and conditions of probation. *People v. Mason, supra,* 5 Cal.3d at 763-764, 488 P.2d at 631-632, 97 Cal.Rptr. at 304-305. Second, and conversely, the February 27th proceedings emasculated respondent's right to *reject* probation and demand sentence. See, *In re Osslo, supra,* 51 Cal.2d at 382, 334 P.2d at 8. Third, the hearing *in absentia* during the pendency of the appeal deprived respondent of any opportunity to seek modification of specific probationary terms (such as the search clause) which he found objectionable. *Id.,* 51 Cal.2d at 380, 334 P.2d at 8. Fourth, and most fundamentally, the proceedings permitted the Municipal Court to strip respondent of his Fourth Amendment rights and to impose affirmative obligations upon him (including the requirement that he forego his Second Amendment right to bear arms), in circumstances which both disserved the rehabilitative purposes of the search clause,[17] and precluded timely efforts by respondent to conform his behavior to probation's affirmative mandates.

For all of these reasons, the February 27th hearing involved far more than "a purely legal matter . . . of the sort that would not give rise to the constitutional right to be present." (Pet. at 16, n. 12.) To the contrary, the prose-

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[17]As a matter of common sense, a probationary search clause cannot positively influence an individual's behavior if he is unaware that it has been imposed. If an individual has "*knowledge* he may be subject to a search at any time, he will be less inclined to have narcotics or dangerous drugs in his possession. [Emphasis added.])" *People v. Kern,* 264 Cal.App.2d 962, 965, 71 Cal.Rptr. 105, 107 (1968). Without notice, however, the search condition can have no such effect.

cution's motion was expressly intended to result in respondent's loss of fundamental rights and liberty interests under both the Fourth and Second Amendments; and the Court's order had precisely that effect, but there would certainly have been a different result if respondent had been present and had exercised one of the options set forth above. Consequently, under California law, the proceedings thoroughly emasculated respondent's right to be present.[18]

e. Petitioner's due process argument is similarly premised on a mischaracterization of the February 27th proceedings as "ministerial and perfunctory". (Pet. at 15, n. 12.) To the contrary, because the prosecution's motion contemplated respondent's immediate loss of his Fourth Amendment rights together with the imposition of affirmative restrictions on his liberty, the interests affected were so substantial as to require the minimal due process protection of actual notice of the hearing. (Pet.App. 8a.) Indeed, this conclusion is compelled by this Court's decisions requiring notice and other minimal due process safeguards to an individual whose fundamental rights or liberty interests are in peril. See, *Gardner v. Florida*, 430 U.S. 349,

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[18]In all likelihood, the same conclusion is compelled under federal constitutional law. Here, "a fair and just hearing [was indeed] thwarted by [respondent's] absence," [*United States v. Gagnon*, No. 84-690 (March 18, 1985), slip op. 4, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934)], if only because respondent was denied the right to refuse probation by the instant procedures.

358, 362 (1977), *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).[19]

Moreover, petitioner dramatically exaggerates the legal and practical implications of the Court of Appeals' decision. The holding did not constitute "a departure from the principles of representative litigation." (Pet. at 10.)[20] Nor, as petitioner suggests, does the decision impose novel or burdensome obligations on either the prosecution or the courts. (Pet. at 10, 17.)[21] Instead, the Court of Ap-

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[19]Because the lack of notice precluded respondent's exercise of significant options which would have directly affected the outcome of the hearing (i.e., a rejection of probation), the interests at stake in this case were precisely those entailed in a sentencing hearing. See, e.g., *Gardner v. Florida, supra*, 430 U.S. at 362; *People v. Kriss, supra*, 96 Cal.App.3d at 920-921, 158 Cal.Rptr. at 424.

[20] Petitioner's histrionics to the contrary, the Court of Appeals' decision contemplates neither personal service on nor direct communication with the defendant. (Compare, Pet. at 10-11.) As the Court of Appeals repeatedly emphasized, the assurance of actual notice to defendant is all that is required: "We cannot be satisfied with inference of notice; we must have proof of it." (Pet.App. 9a.) Where, as here, the court and prosecution are placed on inquiry notice by the defendant's absence, the Court of Appeals' decision mandates only that the Court satisfy itself that counsel has in fact fulfilled his representative obligations by informing the defendant of the proceedings. This rule is, of course, entirely consistent with California law. (See, Opp. *supra* at 12-14.)

[21]Again, the Court's decision imposes no affirmative or duplicative obligations on the prosecution whatsoever. For example, if the Municipal Court had properly inquired and determined that defense counsel had *not* notified respondent of the proceedings, it could have (1) ordered a short continuance to permit such notice by counsel and/or the probation department, (2) forfeited bail, or (3) issued a bench warrant. See, e.g., California Penal Code § 1043(e). On the other hand, if it appeared

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peals' decision simply mandates adherence to routine procedures which have long been a part of California law. (See, Opp., *supra*, at 12-14.)

2. Petitioner inaccurately portrays the Court of Appeals' ruling on the good faith issue as "inconsistent" with this Court's decision in *United States v. Leon, supra*, 104 S.Ct. 3405 (1984). As the Court of Appeals recognized, the good faith exception should not be applied to a defective probation search, and even if it were applied, the instant search would still fail as objectively unreasonable.

a. After a cautious and painstaking cost-benefit analysis, this Court fashioned the good faith exception to the exclusionary rule in search warrant cases and expressly limited the exception to that unique context. *Id.* at 3421. Because in such cases the judgment of a neutral and detached magistrate is interjected between the investigating officers and the decision to search, the Court recognized that the exclusion of evidence where law enforcement officers reasonably relied in good faith "on a subsequently invalidated warrant" would not further the deterrent rationale of the rule. *Id.* Moreover, the application of a good faith exception in that context has the salutary effect of encouraging police to heed the courts' "strong preference" for the procurement of search warrants. *Id.* at 3416-3417.

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from the inquiry that respondent had "absented himself voluntarily with full knowledge" of the proceedings, the Court could have proceeded with the hearing. Penal Code § 1043(e)(4). Enforcement of these well established procedures would eliminate any "uncertainty" or potential for "mischief" (Pet. at 10), while avoiding the fundamentally unfair result that probation is imposed without prior notice to the defendant.

By contrast, there is no similar judicial policy favoring advance consent searches. Quite to the contrary, the courts are wary of such waivers and rigorously scrutinize the purported basis for them to assure that the defendant's right are not inadvertently or unknowingly forfeited. (See, Opp., *supra* at 9-10.) Any rule which permitted law enforcement officers to insulate their decision to conduct such searches on the grounds that *their* interpretation and reliance on a probation clause or other advance waiver was "reasonable" would seriously undermine *this* policy. At the same time, such a rule would actually frustrate the policy favoring the procurement of search warrants in all cases where the police officers believe that an advance waiver might arguably justify the intrusion.

Similarly, unlike search warrant cases, the decision to undertake an advance waiver search does *not* involve the judgment of a judicial officer. Instead, in most instances the police officers rely upon an order which predates the search, frequently by months or even years, for authority which they independently determine is applicable to the particular situation. Moreover, as distinguished from the search warrant context, in California and other states which do not require that the probation officer participate in the search, those who actually execute an advance consent search will frequently have no involvement in the procurement of the underlying court order and therefore will have no personal knowledge concerning the regularity of the proceedings in which it was entered.

Taken together, these factors introduce in advance consent cases greater uncertainty as to the validity of the judicial authority, while vesting greater discretion

in the police for determining whether a search is appropriate, than exists in search warrant cases. As a consequence, the objective reasonableness of the officers' conduct is a more elusive and less easily administered standard in this context, and there is an unacceptable risk that deterrable intrusions will go undetected and unremedied. Accordingly, the good faith exception to the exclusionary rule should not be adopted in the context of advance consent searches.

b. Even petitioner recognizes that if a warrantless search pursuant to a defective probation order is to come within the purview of the proposed good faith exception, it still must be conducted "consistently with . . . [applicable] law regarding the execution of probation searches. . . ." (Pet. at 22.) However, such was clearly not the case here.

In California, a probationer retains an expectation that his privacy will not be disturbed without "reasonable cause"—i.e., unless the "circumstances [indicate] that in connection with effective probation supervision a search is advisable." *People v. Guerrero,* 85 Cal.App.3d 572, 581-582, 149 Cal.Rptr. 558, 560 (1978). Petitioner concedes as much. (Pet. at 19-20, n. 13.) Nevertheless, in this case the officers determined to enter respondent's residence with full knowledge that his probation supervision had *not yet even begun.* Not only was respondent never assigned to a probation officer during the three and one-half months after his sentencing, but even at the February 27th hearing the prosecutor did not request and the Court did not order that respondent report to one. Thus, at the time of the search, respondent's supervision had never even been

tried, and there was no rational basis for the assertion that a search was "advisable" to render his supervision "effective."

Similarly, it is undisputed that the reports of gun fire (which assertedly justified the search) were received several weeks prior to March 3rd, at a time when even the prosecutor was confused as to whether respondent was on probation. (5/21/81 Tr. 97-101.) In these circumstances, respondent reasonably believed that he was not on probation and was not subject to any prohibitions against his possession and use of firearms. Once again, petitioner concedes as much. (Pet. at 23.) Indeed, as we have previously noted, petitioner does not challenge the Court of Appeals' determination that respondent was *not* on probation at that time.

Consequently, by March 3rd, the gun fire reports were several weeks stale and could not reasonably support an inference that firearms were still located on the premises. More importantly, because the complaints were received at a time when respondent did not know that he was on probation (and as matter of law was *not* on probation), they provided no logical basis for a belief that respondent would fail to dispossess himself of any and all weapons, once apprised of the fact that he was subject to the probationary mandates. Thus, the Court of Appeals correctly determined that the search "had a motive of avoidance of Fourth Amendment requirements . . ." and was not "reasonably related to the interests of effective probation supervision." (Pet.App. 11a-13a.) See, *United States v. Johnson,* 722 F.2d 525, 527 (9th Cir. 1983); *People v. Guerrero, supra,* 85 Cal.App.3d at 582, 149 Cal.

Rptr. at 559; *People v. Bremmer, supra,* 30 Cal.App.3d at 1064, 106 Cal.Rptr. at 801.[22]

c. The record also fully supports the Court of Appeals' conclusion that the officers in this case did not possess an objectively reasonable belief in the validity of the search clause. First, after the initial sentencing hearing, the officers knew that although respondent had been sentenced to formal probation, he was never placed under supervision or referred to the probation department.[23]

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[22]Contrary to petitioner's assertions, the Court of Appeals properly seized upon the prosecutor's failure to inform Judge MARLO of either respondent's suspected activities or of her own intentions to search respondent's residence, as further evidence in support of this conclusion. (See, Pet. at 24; Pet.App. 12a.) If in fact the stay had been validly lifted, then Judge MARLO was the individual who possessed the power to require respondent's supervision, to punish violations of his conditions, to modify those conditions, and to revoke probation. *In re Osslo, supra,* 51 Cal.2d at 380, 334 P.2d at 8. Thus, the prosecutor's decision to engineer the reinstatement order and then a search (but not to inform Judge MARLO of her intentions) demonstrates that she was not concerned with either respondent's rehabilitation or protection of the public, since she spurned the most efficacious means of accomplishing those ends.

Finally, there is evidence in the record suggesting that the very law enforcement personnel who conducted the search had been involved in a drug-related criminal investigation of respondent. (Pet.App. 12a-13a; Compare, Pet. 23.) On at least one recent occasion, the prosecutor and another member of the search party had gone to respondent's property to investigate a tip that he was cultivating marijuana. (5/21/81 Tr. 97, 102-103.) This evidence further corroborates the suggestion of a possible subterfuge.

[23]Because the local prosecutor was the motivating force for the search and was in fact the individual who finally determined at respondent's residence that the search should go forward, she was undeniably a member of the law enforcement team and her knowledge must be attributed to all of the executing officers. See, *United States v. Leon, supra,* 104 S.Ct. at 3421, n. 24.

Moreover, despite respondent's failure to report to a probation officer, there had been no effort to "revoke" his probation. Instead, when the gun fire complaints were received, the prosecutor expressed to the officers her good faith *doubts* that respondent was in fact on probation. (4/20/81 Tr. 173, 177-178.) Subsequently, when a hearing was held on her motion, the prosecutor's doubts were confirmed by Judge MARLO who ruled that probation was now "reinstated."

Similarly, the officers in the search party were fully aware of the inadequacies of the February 27th proceedings. The prosecutor who led the search, and who had personally engineered that hearing for the purpose of conducting the warrantless search, also knew that respondent had not been present in court. However, as a prosecutor in California courts, she was certainly charged with knowledge of Penal Code § 977(a) and of the state law requirements for a criminal defendant's effective waiver of his right to be present. (See, Opp. *supra* at 12-14.)

More fundamentally, prior to her final approval of the commencement of the search, the prosecutor learned from respondent's attorney that respondent had in fact received no notice of the February 27 hearing and order. The prosecutor was thereby alerted to a constitutional infirmity in the "reinstatement" order which had not been known to Judge MARLO at the time of those proceedings. Moments later, the prosecutor spoke with Judge MARLO himself who, having been apprised for the first time of respondent's lack of notice of the February 27th proceedings, declined to place his authority behind the search. (4/30/81 Tr. 200.) Nevertheless, despite their

awareness of this express ambivalence from the only individual who was authorized by California law to require respondent's supervision, the prosecutor ordered that the search begin and the officers carried it out.

In these circumstances, the decision to proceed with a search belies any assertion of objectively reasonable reliance on the February 27th order. Impetus for the search having arisen from suspected conduct predating the "reinstatement" order by several weeks, the search was conducted despite the officers' knowledge that respondent had received no opportunity whatsoever to conform his behavior to the probationary conditions by reason of a failure of actual notice to him. In other words, by petitioner's own admission, the officers undertook the search to determine "whether respondent had firearms" (Pet. at 24), but with the knowledge that respondent had never been told that he could not lawfully possess them. Thus, the prosecutor and officers knew of the fatal deficiencies in the probation order prior to commencing the search; and objectively reasonable officers should have realized that a warrantless search under its tarnished authority was both unreasonable and fundamentally unfair.

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## CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be denied. Dated: May 15, 1986.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1672

# In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM D. MERCHANT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

OCTOBER TERM, 1985

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No. 85-1672

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM D. MERCHANT

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## REPLY MEMORANDUM FOR THE UNITED STATES

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1. The court of appeals held that the February 27 hearing was invalid because respondent was not given personal notice that it was scheduled to take place.[1] As we explained

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[1]There is no doubt that the court of appeals ruled that the February 27 hearing was invalid for this reason. See Pet. App. 6a ("[t]he [state municipal] court's attempt to modify the stay was ineffective because [respondent] was not given adequate notice"); *id.* at 10a ("[t]he absence of notice to [respondent] renders the February 27 order a nullity"); *id.* at 10a n.5 ("[w]e need not decide whether [respondent's] presence was required at the February 27 hearing, because we decide that the failure to give him notice of that hearing invalidated the order. We allude to the constitutional right of a defendant to be present at proceedings against him as support for our conclusion that the defendant, not merely his counsel, must be given notice."); *id.* at 14a ("[w]e conclude that [respondent] was not on probation on March 3 when the state officers came to search his house because he was not given notice of the February 27 hearing at which his probation ostensibly was 'reinstated' "). Respondent concedes as much. See Br. in Opp. 6.

in our petition (at 11-14), that decision is inconsistent with the relevant provisions of the Federal Rules of Criminal and Civil Procedure, with the decisions of this Court and other courts of appeals that notice to a party's attorney of a scheduled court proceeding is deemed to be notice to the party himself; and with the practice of representative litigation as it is routinely conducted in the federal and state courts. We also pointed out (Pet. 17) that the court of appeals' ruling does not materially advance the purposes for which the Due Process Clause requires notice. Our submission is that notice to the defendant's attorney of the pendency of any proceeding that may occur during the course of a criminal prosecution satisfies any due process requirement that the defendant himself be notified of the proceeding. Respondent has offered no reason why our submission is not fully consistent with this Court's decisions, why the court of appeals' contrary ruling is necessary to satisfy due process requirements, or why the court of appeals' ruling on the question of notice does not warrant this Court's review.

Relying primarily upon *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), respondent maintains (Br. in Opp. 16-17) that he was entitled to be personally notified of the February 27 hearing because the order entered by the trial judge at that proceeding affected his Fourth Amendment rights.[2] *Gagnon*, however, does not support the court of appeals' ruling. *Gagnon* held that a probationer was entitled to notice of both a preliminary and a final probation revocation hearing (411 U.S. at 782), but it did not suggest that notice to a probationer's attorney of those proceedings would be insufficient to satisfy due process requirements. Indeed, the

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[2]Respondent's argument (Br. in Opp. 15) that the court's order restricted his constitutional right to possess the 80 firearms that were found scattered throughout his house is frivolous. See *Lewis* v. *United States*, 445 U.S. 55, 65-66 n.8 (1980); *United States* v. *Miller*, 307 U.S. 174 (1939).

primary issue in *Gagnon* was whether due process required that an attorney be appointed for an indigent probationer at a probation revocation hearing (*id.* at 783-791). One of the functions that an attorney serves is to inform his client of any upcoming proceedings. For that reason, notice to a party's attorney of any such proceeding is properly deemed to be notice to the party, as this Court held in *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962).

Otherwise, respondent makes little effort to defend the court of appeals' ruling on its own terms. Instead, he devotes the bulk of his response to the defense of claims that the court of appeals did not address: namely, that he did not consent to the imposition of the consent-to-search clause in the original probation order (Br. in Opp. 8-11); that his probation could not be revoked for possessing firearms since he lacked notice that this condition of his probation was in effect (*id.* at 11-12); and that the hearing was invalid because he was not present (*id.* at 12-16). None of petitioner's arguments, however, supports the court of appeals' ruling that the defendant must be personally notified of every proceeding in a criminal case, which was the sole ground on which the court of appeals found the probation order invalid.

2. With regard to the second question presented in the petition, respondent first argues (Br. in Opp. 18-19) that the "reasonable mistake" exception to the exclusionary rule, which was adopted in *United States* v. *Leon*, No. 82-1771 (July 5, 1984),does not apply to a search carried out pursuant to a consent-to-search clause in a judgment of probation. *Leon* does not apply in this setting, he argues, because there is no policy favoring reliance on such provisions similar to the policy favoring resort to the warrant process. That claim, however, is inconsistent with the well-settled views of the California courts, which have long found that a consent-to-search clause is a reasonable

condition of probation and is consistent with the legitimate interests of the state probation process and the Fourth Amendment (see Pet. 19 & n.13).[3] Because provisions of this type are lawful as a general matter under state law, there is no reason not to apply *Leon* to respondent's case.

Nor does that result unduly delegate authority to a law enforcement officer to determine whether to carry out a particular search, as respondent contends (Br. in Opp. 19-20). Under California law, there must be reasonable grounds to conduct a probation search, and the search itself must be performed in a reasonable manner (Pet. 19 n.13). Respondent's argument, at most, simply supports the proposition that courts should carefully scrutinize a search carried out pursuant to the authority granted the police by a consent-to-search provision. That proposition, however, does not require that an objectively reasonable search should automatically and invariably require suppression because of a technical mistake by the court in the process by which such a condition of probation is imposed.

Respondent also argues that the officers' reliance on the state court's February 27 order was not objectively reasonable, but his contentions on that issue are not persuasive. For instance, he relies (Br. in Opp. 20-22) on the court of appeals' conclusion that the search of his residence was not related to his probation since he had not yet been assigned a probation officer. As we have explained (Pet. 24 & n.16), however, the decision to search respondent's residence was

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[3]Indeed, the California Supreme Court recently held that the imposition of a consent-to-search clause on a parolee was a reasonable condition of parole. See *People* v. *Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986). In that case, the court approvingly cited its earlier decision in *People* v. *Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), cert. denied, 405 U.S. 1016 (1972), which held that a consent-to-search clause was a reasonable and lawful condition of probation (see 714 P.2d at 1267, 224 Cal. Rptr. at 126).

prompted by the reports of gunfire on his property, ~~which~~ and was directly related to the reason he was forbidden to possess firearms while he was on probation.[4]

Respondent also argues (Br. in Opp. 21) that, because the reports of gunfire came at a time when he did not believe that he was forbidden to possess firearms, there was no reason for the prosecutor to conclude that he would not rid himself of them once he learned that this condition of his probation was in effect. But the question is not whether *respondent* reasonably believed that he was *not* on probation, but whether the *prosecutor* reasonably believed that he *was*. And the best proof that her belief was reasonable is the fact that both the state municipal court and the district court held (see Pet. 7-8 n.7; Pet. App. 17a) that respondent was in fact on probation at the time of the search (see *Leon*, slip op. 27). For the same reason, respondent errs in claiming (Br. in Opp. 23-24) that the officers acted unreasonably because respondent and his lawyer told the prosecutor once the search had begun that respondent was unaware of the court's February 27 order. The reasonable course for the officers and the prosecutor was to rely on the state court's facially-valid February 27 order, just as it was reasonable for the officers in *Massachusetts* v. *Sheppard*, No. 82-963 (July 5, 1984), to rely on the search warrant at issue in that case. Neither respondent's protests nor those of his attorney made that reliance unreasonable.

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[4]Respondent suggests (Br. in Opp. 22 n.22) that the search was actually a subterfuge to discover narcotics. The record does not support that assertion. The state prosecutor explained at the suppression hearing that she had received a complaint from one of respondent's neighbors that marijuana plants were growing on the boundary between that neighbor's property and respondent's. That complaint, however, turned out to be unfounded (5/21/81 Tr. 97-98, 102-106, 118-120), and there is no evidence that the local prosecutor thereafter sought to search respondent's house because she believed that he possessed narcotics.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
*Solicitor General*

MAY 1986

DOJ-1986-05

Supreme Court, U.S.
FILED
SEP 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1672

# In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM D. MERCHANT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## JOINT APPENDIX

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*Berkeley, California 94704*
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**PETITION FOR A WRIT OF CERTIORARI FILED APRIL 11, 1986**
**CERTIORARI GRANTED JUNE 30, 1986**

212pp

# In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1672

UNITED STATES OF AMERICA, PETITIONER

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**JOINT APPENDIX**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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D.C. No. CR 81-109-1 SW (ST)

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UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*v.*

WILLIAM DAVIDSON MERCHANT, DEFENDANT-APPELLANT.

---

March 17, 1981

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**RELEVANT DOCKET ENTRIES**

| Date | Filings—Proceedings |
|---|---|
| 6/7/83 | DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL FOR APPELLANT; COUNSEL FOR APPELLEE. ogm |
| 6/7 | Received DC Time Schedule, (not stamped filed in DC); Transcripts ordered on June 10, 1983; Reporter's transcripts due on June 17, 1983; the opening brief, excerpts of record and designation of record due on July 7, 1983; appellee's designation of record due on July 22, 1983; appellee's brief is due on July 29, 1983; the reply brief, if any, is due Aug. 12, 1983. (CRIMATT) ogm |

| | |
|---|---|
| 6/20 | Filed motion by Court Reporter (Vickstein) motion for extension to file transcript to July 7, 1983. (CRIMATT) ogm |
| 6/27 | Filed Order (SNEED); Court Reporter Pella's motion of June 20, 1983 for an extension of time in which to file the transcript is granted in part. The transcript is due July 18, 1983. The parties will meet this schedule: appellant's opening brief, excerpts of record, and designation of the clerk's record are due August 8, 1983; appellee's designation of the record is due August 22, 1983; appellee's brief is due August 29, 1983; the reply brief, if any, is due September 12, 1983. (pw) |
| 7/13 | Filed as of 7/7/83 Court Reporter's (William R. Johnston) motion to file transcript to August 15, 1983. lw |
| 7/27 | Filed Order (SNEED) Court Reporter William Johnston's motion for an extension of time to file the transcript is granted. The transcript is due August 15, 1983. No further extensions will be granted to the court reporter to file the transcript absent extraordinary circumstances. The clerk of the district court will promptly notify any other court reporters involved in this appeal of the due date. |
| 8/26 | REFERRED TO CRIMATT RE: LATE APPELLANT BRIEF. gb |

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| 9/6 | Filed Order (SNEED) Teh [*sic*] transcript was due Aug. 15, 1983. Court reporter William Johnston will file the transcript by Sept. 9, 1983 or explain in a motion why the transcript has not been filed. The parties will meet the following time schedule: aplt's opening brief, excerpts of record, and designation of the clerk's record are due Sept. 30, 1983; aple's designation of the record is due Oct. 14, 1983; aple's brief is due Oct. 21, 1983; the reply brief, if any, is due Nov. 4, 1983. |
| 9/30 | Filed Orig & 15 Appellant's Opening brief (33 pgs) and FIVE EXCERPT OF RECORD 9/29 EM |
| 9/30 | R'cvd courtesy copy of aplt's designation of clk's record. ogm |
| 10/27 | Filed Government's motion for ext. of time in which to file its brief. 10/26 ot (CRIMATT) |
| 11/15 | Filed Order (SNEED) Aple's motion of Oct. 27, 1983 for an ext. of time in which to file its brief is granted. Aple's brief is due Nov. 21, 1983. The reply brief, if any, is due Dec. 05, 1983. A further motion for ext. of time from aple will be viewed with disfavor. ot |
| 11/18 | Recv'd as of Nov. 10, 1983, CERTIFICATE OF RECORD (11/8/83) referred to CRIMATT: late R/T's) lw |
| 11/22 | Recv'd Orig & 15 aple's brief (27 pgs) (Cert. of Record not yet filed.) lw |
| 11/30 | Filed aplt's motion to ext. time to file its reply brief. 11/29 (CRIMATT) eal |

| | |
|---|---|
| 12/13 | Filed Order (SNEED) the Certificate of Record, received Nov. 18, 1983, is ordered filed. Appellee's brief received November 22, 1983, is also ordered filed. ogm |
| 12/13 | FILED CERTIFICATE OF RECORD PREVIOUSLY RECEIVED. ogm |
| 12/13 | Filed Orig & 15 appellee's briefs already received. ogm |
| 12/13 | Filed Order (SNEED) aplt's motion of Nov. 30, 1983 for an extension of time to file the reply brief is granted in part. The reply brief is due Dec. 23, 1983. ogm |
| 12/27 | Filed as of 12/23/83, Orig & 15 Aplt's reply briefs. (21 pgs) 12/23 ogm |
| 12/27 | Filed as of 12/23/83, Aplt's motion to augment the record on appeal. (CRIMATT) 12/23 ogm |
| 1984 | |
| 1/12/84 | Filed Order (SNEED) aplt's motion to augment the record is denied. Aplt may lodge the supplemental report and petition date 4/30/81 with the clerk of this Court. The panel that hears this case on the merits may give these materials such consideration as it deems appropriate. ogm |
| 1/23 | Lodged one envelope of aplt's exhibits pursuant to 1/12/84 order. (Case File) lw |
| 5/7 | Ltr sent to aple re: failure to desig. clerk's record. EM |
| 5/21 | Recvd aple's response to ltr of 5/7/83; re: desig. record on 5/17/84. EM |
| 6/15 | ARGUED & SUBMITTED BEFORE: MERRILL, FLETCHER & CANBY, CJJ sz |

| | |
|---|---|
| 6/15 | Lodged aplt's condition of probation, (exhibit). PANEL sz |
| 6/15 | Recvd as of June 14 letter date June 14, from (J.F. Penrose, counsel for aple) re: additional citations. (6/14)(Panel) tsp |
| 6/28 | Filed Order (MERRILL, FLETCHER & CANBY, CJJ) The materials and exhibits lodged with the court in connection with aplt's motion to augment the record on appeal are hereby ordered filed. eal |
| 6/28 | Filed one envelope of aplt's exhibits previously recv'd. eal |
| 7/5 | FILED AS OF 12/13/83, CERT. TRANSC. OF RECORD ON APPEAL IN FIVE VOLUMES: VOLS. I-II, PLDGS (Orig.); VOLS. III-V R/T's (Orig). EM |
| 5/14/85 | ORDERED OPINION (FLETCHER) FILED AND JUDGMENT TO BE FILED AND ENTERED. |
| 5/14 | FILED OPINION—REVERSED. |
| 5/14 | FILED AND ENTERED JUDGMENT. EM |
| 5/20 | Filed motion & order (Dep. Clk) granting aple USA ext. of time to file petition for rehearing and suggestion for rehearing en banc to and including June 27, 1985. (5/17) EM |
| 6/26 | Filed aple's (USA) Petition for Rehearing with Suggestion for Rehearing En Banc. (15 pgs) 6/25 PANEL & ACTIVE JUDGES. EM |
| 7/17 | Recvd ltr from aple (USA) dtd 7/15, re: addtl authorities. 7/15 Panel & Active Judges. EM |

| | |
|---|---|
| 7/26 | Filed Order (MERRILL, FLETCHER & CANBY) Appellant is directed to file a response to appellee's petition for rehearing. The response shall be filed within fourteen (14) days from the date of this order and shall not exceed fifteen (15) pages in length. (7/26) cmk |
| 7/31 | Filed aplt's motion for ext of time to file opposition to petition for rehearing. 7/31 PANEL EM |
| 8/8 | Filed Order (MERRILL, FLETCHER & CANBY) Appellant's request for an extension in which to file a response to the Government's petition for rehearing is granted. The response shall be filed on or before Sept. 6, 1985. (8/7) cmk |
| 9/9 | Filed aplt's response to government's petition for rehearing and to suggestion for rehearing en banc. 09/06 (Panel only, insufficient copies) -ot- |
| 9/12 | Rec'd 33 addtl copies of aplt's response to government's petition for rehearing, which was filed on 09/90/85. (All Active Judges) -ot- |
| 10/1 | Rec'd aple's addtl citations of authority. 09/27 (Panel) -ot- |
| 12/3 | Recvd ltr dtd 12/2 from aple re: additional citations. (Panel) tsp |
| 1/13/86 | Filed Order (MERRILL, FLETCHER & CANBY) The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. 1/13 cmk |
| 1/22 | MANDATE ISSUED |
| 2/6 | Filed aple's motion to recall mandate and for 30 day stay of mandate. 2/6 (FLETCHER) -ot- |

| | |
|---|---|
| 3/27 | Rec'd letter dated 3/26/86, from Svetcov, AUSA, re: the filing of the cert. and his motion to recall the mandate. 3/26 (FLETCHER) -ot- |
| 4/16 | Filed Order (MERRILL, FLETCHER & CANBY) Appellee's motion to recall mandate and for thirty day stay of mandate pending application for certiorari is hereby granted. 4/16 cmk |
| 5/12 | Rec'd SC notice of filing petition for certiorari on 4/11/86. #85-1672 -ot- |
| 7/10 | Filed as of 7/7, cert. copy of SC order of June 30, 1986 granting certiorari #85-1672 -ot- (P) |

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

---

No. CR 81-00109-01

---

UNITED STATES OF AMERICA

*v.*

WILLIAM D. MERCHANT

---

Judge: JUDGE WILLIAMS
Defendant:
D1 MERCHANT, WILLIAM D

Dft ID: -3553

Defendant terminated: 5/18/83

Terminated counts:
MANUFACTURE PHENCYCLIDINE HCL (PCP), 21:841(A)(1)(S1)

MANUFACTURE OF PHENCYCLIDINE, 21:841(a)(1) & 21:841(B)(1)(B) (1-2), POSSESSION OF PIPERIDINE, 21:841(D) (3), POSSESS PIPERIDINOCYCLOHEXANECARBONITRILE (PCC), 21:841(A)(1) (S2), POSSESS-PIPERIDINOCYCLOHEXANECARBONITRILE W/INTENT TO MANUFACTURE PHENCYCLIDINE HCL, 21:841(D) (S3)

Offense Level (disposition): FEL

Total Jail: 120 Mo  Total Fine: $25,000.00

Complaints:

Fld mas complaint 03/17/81 (CONSPIRING TO POSSESS WITH INTENT TO MANUFACTURE & DISTRIBUTE PHENCYCLIDINE).

Disposition

(Count S1) COUNT S1, 10 YEARS JAIL, 7 YEARS SPECIAL PAROLE, $25,000 FINE, CONTACT PROBATION OFFICE 1ST & 15TH OF EACH MONTH (05/18/83) (Counts 1-3, S2-S3) Dismissed. 05/18/83

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**RELEVANT DOCKET ENTRIES**

| Date | NR | Filing – Proceedings |
|---|---|---|
| 03/17/81 | 1 | Filed magistrate complaint (MAGISTRATE BLACKER) (Dkt'd 04/09/81). |
| | | Defendant arrested (Dkt'd 04/09/81). |
| 03/18/81 | 2 | Minute sheet filed (UNREPORTED) (MAGISTRATE BLACKER) (Dkt'd 04/09/81). |
| | | Defendant's first appearance (Dkt'd 04/09/81). |
| | | Bail hearings held (BAIL, $250,000.) (Dkt'd 04/09/81). |
| | | Bail hearings continued to 03/19/81 @ 9:30 AM (MAGISTRATE BLACKER) (Dkt'd 04/09/81). |
| | | Preliminary examination set for 03/19/81 @ 9:30 AM (MAGISTRATE BLACKER) (Dkt'd 04/09/81). |

| | | |
|---|---|---|
| 03/19/81 | 3 | Minute sheet filed (UNREPORTED) (MAGISTRATE BLACKER) (Dkt'd 04/09/81). |
| | | Bail hearing continued to 03/26/81 @ 9:30 AM (MAGISTRATE BLACKER) (Dkt'd 04/09/81). |
| | | Preliminary examination continued to 03/26/81 @ 9:30 AM (MAGISTRATE BLACKER) (Dkt'd 04/09/81). |
| | | Attorney STEPANIAN, MICHAEL added to case (Dkt'd 04/09/81). |
| 03/25/81 | 4 | Field indictment (Dkt'd 04/09/81). |
| | | Case assigned to JUDGE WILLIAMS (Dkt'd 04/15/81). |
| 03/26/81 | 5 | Minute sheet filed (UNREPORTED) (MAGISTRATE BLACKER) (Dkt'd 04/09/81). |
| | | Arraignment held (Counts 1-3) (Dkt'd 04/09/81). |
| | | Defendant enters plea of not guilty (Counts 1-3) (MAGISTRATE BLACKER) (Dkt'd 04/09/81). |
| | | Bail hearing held (BAIL TO REMAIN AT $250,000.) (Dkt'd 04/09/81). |
| | | Hearing on pre-trial motions set for 04/15/81 @ 2:00 PM (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 04/09/81). |
| | | Trial date set for 05/04/81 @ 9:30 AM (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 04/09/81). |
| 04/09/81 | 6 | Minute sheet filed (UNREPORTED) (MAGISTRATE BLACKER) (Dkt'd 04/15/81). |

| | | |
|---|---|---|
| | | Bail hearing held (PROPERTY TO BE POSTED IN AMOUNT OF $250,000.) (MAGISTRATE BLACKER) (Dkt'd 04/15/81). |
| 04/15/81 | 13 | Minute sheet filed (C/R JOHNSTON, BILL) (JUDGE WILLIAMS) (Dkt'd 05/07/81). |
| | | Hearing on pre-trial motions continued to 05/20/81 @ 2:00 PM (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 05/07/81). |
| | | Trial date set for 06/08/81 @ 9:30 AM (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 05/07/81). |
| 04/16/81 | 14 | Minute sheet filed (MAGISTRATE BLACKER) (Dkt'd 05/07/81). |
| | | Bail hearing held (BAIL, $500,000 WITH CONDITIONS, SEE ORDER) (MAGISTRATE BLACKER) (Dkt'd 05/07/81). |
| | 15 | DEFENDANT MERCHANT'S RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION FOR REVIEW OF BAIL (Dkt'd 05/07/81). |
| | 16 | DECLARATION OF MICHAEL STEPANIAN IN RESPONSE TO GOVERNMENT'S MOTION FOR REVIEW OF BAIL (Dkt'd 05/07/81). |
| 04/22/81 | 17 | Criminal property bond in the amount of $500,000.00 (SPECIAL CONDITIONS, SEE APPEARANCE BOND DATE OF APPEARANCE, 5-20-81 AT 2:00 P.M.) (MAGISTRATE BLACKER) (Dkt'd 05/07/81). |

05/14/81 18 Motion for discovery/inspection filed (MOT#2) (Counts 1-3) (Dkt'd 05/26/81).

18 Mark the beginning of a potential excludable period of type X-E starting on 05/14/81 and not to extend beyond 05/20/81 ((In re MOTFDI on 5/14/81)) (Dkt'd 05/26/81).

Motion for discovery/inspection hearing set for 05/20/81 @ 2:00 AM (MOT#2) (JUDGE WILLIAMS) (Dkt'd 05/26/81).

19 Memorandum in support of motion for discovery/inspection (MOT #2) (Dkt'd 05/26/81).

20 Motion filed (MOT#3) (MOTION FOR DISCLOSURE OF INFORMANT) (Dkt'd 05/26/81).

Motion hearing set for 05/20/81 @ 2:00 AM (MOT#3) (JUDGE WILLIAMS) (Dkt'd 05/26/81).

21 Memorandum in support of motion. (MOT#3) (Dkt'd 05/26/81).

Mark the beginning of a potential excludable period of type X-E starting on 05/14/81 and not to extend beyond 05/20/81 ((In re MOTFOD on 5/14/81)) (Dkt'd 05/26/81).

22 Motion to suppress evidence filed (MOT#4) (Counts 1-3) (Dkt'd 05/26/81).

22 Mark the beginning of a potential excludable period of type X-E starting on 05/14/81 and not to extend beyond 05/20/81 ((In re MOTFSE on 5/14/81)) (Dkt'd 05/26/81).

Motion to suppress evidence hearing set for 05/20/81 (MOT#4) (JUDGE WILLIAMS) (Dkt'd 05/26/81).

23 Memorandum in support of motion to suppress evidence (MOT#4) (Dkt'd 05/26/81).

05/19/81 24 Motion for continuance filed (MOT#5) (Dkt'd 05/27/81).

Motion for continuance granted (MOT#5) (JUDGE WILLIAMS) (Dkt'd 05/27/81).

25 Order filed (ORDER GRANTING CONTINUANCE MOTION) (JUDGE WILLIAMS) (Dkt'd 05/27/81).

06/16/81 26 Memorandum in opposition to motion for discovery/inspection (MOT#2) (Dkt'd 06/17/81).

27 Filed answer to motion for discovery/ inspection (MOT#2) (Dkt'd 06/17/81).

28 Filed answer to motion to suppress evidence (MOT#4) (Dkt'd 06/17/81).

29 Memorandum in opposition to motion to suppress evidence (MOT#4) (Dkt'd 06/17/81).

30 Answer to motion (MOT#3) (" ") (Dkt'd 06/17/81).

31 Memorandum in opposition to motion (MOT#3) (Dkt'd 06/17/81).

32 Motion to dismiss filed (MOT#6) (Counts 1-3) (JURY CHALLENGE) (Dkt'd 06/23/81).

32 Mark the beginning of a potential excludable period of type X-E starting on 06/16/81 ((In re MOTFDC on 6/16/81)) (Dkt'd 06/23/81).

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| | | Motion to dismiss hearing set for 08/19/81 @ 2:00 PM (MOT#6) (JUDGE WILLIAMS) (Dkt'd 06/23/81). |
| | | Memorandum in support of motion to dismiss (MOT#6) (Dkt'd 06/23/81). |
| | 34 | Memorandum in support of motion to dismiss (MOT#6) (Dkt'd 06/23/81). |
| | 35 | CERTIFICATE OF MAILING OF MOTION (Dkt'd 06/23/81). |
| 06/17/81 | 36 | Superseding indictment (Dkt'd 06/23/81). |
| 06/18/81 | 37 | Motion for continuance filed (MOT#7) (AND FOR EXCLUDABLE DELAY) (Dkt'd 06/23/81). |
| | 38 | Order filed (RE:CONTINUANCE AND EXCLUDABLE ENTRY) (JUDGE WILLIAMS) (Dkt'd 06/23/81). |
| | | Hearing on pre-trial motions set for 08/19/81 (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 06/23/81). |
| | | Excludable delay based on finding the ends of justice served by continuance began on 05/19/81 and ended on 08/19/81 (JUDGE WILLIAMS) (Dkt'd 06/23/81). |
| 07/17/81 | 39 | Answer to motion to dismiss (MOT#6) (JURY CHALLENGE) (Dkt'd 07/22/81). |
| 08/19/81 | 40 | Minute sheet filed (REPORTER S. DAINS) (JUDGE WILLIAMS) (Dkt'd 08/26/81). |
| | | Motion to suppress evidence hearing held (MOT#4) (JUDGE WILLIAMS) (Dkt'd 08/26/81). |
| | | Motion for discovery/inspection hearing held (MOT#2) (JUDGE WILLIAMS) (Dkt'd 08/26/81). |

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| 08/27/81 | 42 | Answer to motion to dismiss (MOT#6) (JUDGE WILLIAMS) (Dkt'd 08/31/81). |
| 09/01/81 | | Motion for continuance filed (MOT#9) (MOTION FOR CONTINUANCE OF PRETRAIL HEARING DATE AND REQUEST FOR EXCLUDABLE TIME) (JUDGE WILLIAMS) (Dkt'd 09/09/81). |
| | 44 | Order filed (RE EXCLUDABLE DELAY) (JUDGE WILLIAMS) (Dkt'd 09/09/81). |
| | | Motion for continuance granted (MOT#9) (JUDGE WILLIAMS) (Dkt'd 09/09/81). |
| | | Excludable delay based on finding the ends of justice served by continuance began on 09/02/81 and ended on 10/20/81 (JUDGE WILLIAMS) (Dkt'd 09/09/81). |
| 09/08/81 | 43 | Motion by government filed (MOT#8) (TO DESTROY EVIDENCE) (JUDGE WILLIAMS) (Dkt'd 09/09/81). |
| 09/11/81 | | Motion for discovery/inspection granted (MOT#2) (JUDGE WILLIAMS) (Dkt'd 09/18/81). |
| | 45 | Order filed (JUDGE WILLIAMS) (Dkt'd 09/18/81). |
| 09/18/81 | 46 | Order filed (JUDGE WILLIAMS) (Dkt'd 09/23/81). |
| | | Motion by government granted (MOT#8) (TO DESTROY EVIDENCE) (JUDGE WILLIAMS) (Dkt'd 11/02/81). |
| 10/20/81 | 48 | Minute sheet filed (REPORTER: WM. JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 10/22/81). |

Motion to suppress evidence hearing held (MOT#4) (JUDGE WILLIAMS) (Dkt'd 10/22/81).

Excludable delay due to hearings on Pretrial Motions began on 05/14/81 and ended on 10/20/81 (Dkt'd 10/22/81).

Motion to suppress evidence taken under advisement (MOT#4) (JUDGE WILLIAMS) (Dkt'd 10/22/81).

Mark the beginning of a potential excludable period of type X-G starting on 10/20/81 and not to extend beyond 11/19/81 ((In re MOTADVSE on 10/20/81)) (Dkt'd 10/22/81).

10/21/81 47 Filed transcript of proceedings for 04/16/81 (Dkt'd 10/21/81).

10/28/81 49 Order filed (ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS) (JUDGE WILLIAMS) (Dkt'd 11/10/81).

Motion to suppress evidence denied (MOT#4) (Dkt'd 11/10/81).

Excludable delay while defendant motion under advisement, began on 10/20/81 and ended on 10/28/81 (Dkt'd 11/10/81).

11/02/81 50 Order filed (ORDER DENYING MOTION TO DISMISS INDICTMENT STAY PROCEEDINGS AND TO GRANT DISCOVERY) (JUDGE WILLIAMS) (Dkt'd 11/10/81).

Motion to dismiss hearing held (MOT#6) (Dkt'd 11/10/81).

Motion to dismiss denied (MOT#6) (JUDGE WILLIAMS) (Dkt'd 11/10/81).

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| | | Excludable delay due to hearings on Pretrial Motions began on 06/16/81 and ended on 11/02/81 (Dkt'd 11/10/81). |
| 03/09/82 | 52 | Notice filed (TO SET FOR TR, HEARING SET FOR 4/21/82 @ 10:00 A) (JUDGE WILLIAMS) (Dkt'd 03/24/82). |
| 04/22/82 | 53 | Minute sheet filed (REPORTER JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 04/27/82). |
| | | Trial date set for 06/28/82 @ 10:00 AM (Counts 1-3, S1-S3) (JURY TO BE WAIVED AT TRIAL.) (JUDGE WILLIAMS) (Dkt'd 06/02/83). |
| 05/11/82 | 55 | Notice filed (OF RELATED CASE.) (JUDGE WILLIAMS) (Dkt'd 05/13/82). |
| 05/27/82 | 56 | Minute sheet filed (REPORTER DAINS) (JUDGE WILLIAMS) (Dkt'd 06/02/82). |
| | | US Attorney WARD, GREGORY H added to case (Dkt'd 06/02/82). |
| | | Motion to suppress evidence (MOT#4) reopened (JUDGE WILLIAMS) (Dkt'd 06/02/82). |
| | | Motion to suppress evidence hearing set for 07/14/82 @ 10:00 AM (MOT#4) (JUDGE WILLIAMS) (Dkt'd 06/02/82). |
| | | Excludable delay based on finding the ends of justice served by continuance began on 05/26/82 and ended on 07/14/82 (JUDGE WILLIAMS) (Dkt'd 06/02/82). |

06/15/82 58 Order filed (THE TIME BETWEEN 5-26-82 UNTIL 6-18-82, IS EXCLUDED UNDER THE SPEEDY TRIAL ACT PURSUANT TO 18 USC 3161(H)(8)) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

Mark the beginning of a potential excludable period of type X-T starting on 05/26/82 and not to extend beyond 06/18/82 ((In re ORD on 6-15-82)) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

06/16/82 59 Order filed (ALL MOTION FILING AND HEARING DATES SHALL BE VACATED. THE FOLLOWING DATES WILL BE IN EFFECT: 6-25-82 DEF'S FILE MOTION 7-14-82 GOV'T RESPONSE 7-21-82 HEARING AT 10:00 IN SF.) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

Motion to suppress evidence filed (MOT#10) (Counts 1-3, S1-S3) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

Mark the beginning of a potential excludable period of type X-E starting on 06/16/82 ((In re MOTFSE on 6-16-82)) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

60 Motion to suppress evidence filed (MOT#11) (Counts 1-3, S1-S3) (MOTION TO CONTINUE FILING AND HEARING DATES FOR MOTION TO RECONSIDER DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

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| | 61 | DECLARATION OF CRISTINA C. ARGUEDAS RE MOTION TO CONTINUE FILING AND HEARING DATES FOR DEFENDANT'S MOTION FOR RECONSIDERATION. (JUDGE WILLIAMS) (Dkt'd 06/18/82). |
| 06/23/82 | 62 | Motion filed (MOT#12) (TO SUBSTITUTE ATTORNEY OF RECORD.) (JUDGE WILLIAMS) (Dkt'd 06/24/82). |
| | | Motion granted (MOT#12) (TO SUBSTITUTE ATTORNEY OF RECORD) (JUDGE WILLIAMS) (Dkt'd 06/24/82). |
| | | Filed substitution of COOPER, PENELOPE M. as attorney for defendant (JUDGE WILLIAMS) (Dkt'd 06/24/82). |
| 06/28/82 | 64 | Notice filed (MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION TO SUPPRESS.) (JUDGE WILLIAMS) (Dkt'd 07/01/82). |
| | | Motion to suppress evidence hearing set for 07/21/82 @ 10:00 AM (MOT#11) (JUDGE WILLIAMS) (Dkt'd 07/01/82). |
| | 65 | Order filed (ALL MOTION FILING AND HEARING DATES IN THE ABOVE CASE SHALL BE VACATED AND THE FOLLOWING DATES WILL BE IN EFFECT, 6-25-82—DEFENDANT'S FILE MOTION, 7-14-82—GOV'T RESPONSE, 7-21,82—HEARING AT 10:00 IN SF.) (JUDGE WILLIAMS) (Dkt'd 07/01/82). |

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| 07/14/82 | 66 | Motion by government filed (MOT#14) (RE EXTENSION OF TIME TO RESPOND TO MOTION FOR RECONSIDERATION OF MOTION TO SUPPRESS FROM 7/14 TO 7/21/82 DECLARATION OF J. PENROSE) (Dkt'd 07/16/82). |
| 08/20/82 | 67 | Notice filed (CLERK'S NOTICE TO COUNSEL RE HEARING SET) (Dkt'd 08/24/82). |
| | | Motion to suppress evidence hearing reset to 09/08/82 @ 10:00 AM (MOT#11) (IN SAN FRANCISCO) (JUDGE WILLIAMS) (Dkt'd 08/24/82). |
| 08/27/82 | 68 | Answer to motion to suppress evidence (MOT#11) (Dkt'd 08/31/82). |
| 09/07/82 | 69 | Reply to answer to motion to suppress evidence (MOT#11) (Dkt'd 09/09/82). |
| 09/08/82 | 70 | Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 09/14/82). |
| | | Motion to suppress evidence hearing held (MOT#11) (JUDGE WILLIAMS) (Dkt'd 09/14/82). |
| | | Motion to suppress evidence denied (MOT#11) (JUDGE WILLIAMS) (Dkt'd 09/14/82). |
| | | Excludable delay due to hearings on Pretrial Motions began on 06/16/82 and ended on 09/08/82 (Dkt'd 09/14/82). |
| | | Excludable delay based on finding the ends of justice served by continuance began on 05/26/82 and ended on 06/18/82 (Dkt'd 09/14/82). |
| | | Hearings set to 09/22/82 @ 11:00 AM (IN SAN FRANCISCO) (JUDGE WILLIAMS) (Dkt'd 09/14/82). |

09/23/82 72 Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 09/24/82).

09/24/82 —TRIAL DATE NOT SET, DEF TO NOTICE MOTION (JUDGE WILLIAMS) Dkt'd 09/24/82).

Excludable delay due to hearings on Pretrial Motions began on 05/14/81 and ended on 09/11/81 (Dkt'd 09/27/82).

10/08/82 74 Motion filed (MOT#15) (RE: EXONERATION OF PORTION OF PROPERTY POSTED AS SECURITY) (Dkt'd 10/14/82).

Motion hearing set for 10/18/82 @ 10:00 AM (MOT#15) (JUDGE WILLIAMS) (Dkt'd 10/14/82).

Mark the beginning of a potential excludable period of type X-E starting on 10/08/82 ((In re MOTFOD on 10-8-82)) (Dkt'd 10/14/82).

75 Memorandum in support of motion (MOT#15) (Dkt'd 10/14/82).

76 —(MOT#15) (DECLARATION OF C. ARGUEDAS) (Dkt'd 10/14/82).

77 —PROOF OF SERVICE RE MOTIONS FILED THIS DAY (Dkt'd 10/14/82).

10/18/82 78 Order filed (EXONERATING PART OF BOND) (JUDGE WILLIAMS) (Dkt'd 10/20/82).

Bond exonerated (EXONERATING PROPERTY POSTED BY PAUL & KATHY KELLEY, LOCATED AT 235 JONES ROAD, LOS GATOS, CA) (JUDGE WILLIAMS) (Dkt'd 10/20/82).

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| | 79 | Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 10/20/82). |
| | | Bail hearing held (JUDGE WILLIAMS) (Dkt'd 10/20/82). |
| | | Mark the beginning of a potential excludable period of type X-E starting on 10/18/82 ((In re BNDHRGH on 10-18-82)) (Dkt'd 10/20/82). |
| | | Excludable delay due to hearings on Pretrial Motions began on 10/18/82 and ended on 10/18/82 (Dkt'd 10/20/82). |
| 10/22/82 | 81 | Order filed (PERMITTING TRAVEL TO SOUTHERN DISTRICT OF CA) (JUDGE WEIGEL) (Dkt'd 10/25/82). |
| 11/16/82 | 82 | Notice filed (EVIDENTIARY HEARING ON MOTION TO SUPPRESS SET FOR 12-13-82 @ 10AM) (JUDGE WILLIAMS) (Dkt'd 11/23/82). |
| | | Motion to suppress evidence hearing set for 12/13/82 @ 10:00 AM (MOT#10) (RE: EVIDENTIARY HEARING ON MOTION) (JUDGE WILLIAMS) (Dkt'd 11/23/82). |
| 12/13/82 | 83 | Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 12/20/82). |
| | | Motion to suppress evidence hearing reset to 01/12/83 @ 2:00 PM (MOT#10) (JUDGE WILLIAMS) (Dkt'd 12/20/82). |
| | | Mark the beginning of a potential excludable period of type X-A starting on 12/13/82 and not to extend beyond 01/12/83 ((In re MINSHTF on 12-13-82)) (Dkt'd 12/20/82). |

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| 01/12/83 | 85 | Minute sheet filed (C/R-VIVIAN PELLA) (JUDGE WILLIAMS) (Dkt'd 01/17/83). |
| | | Motion by government hearing held (MOT#14) (JUDGE WILLIAMS) (Dkt'd 01/17/83). |
| | | Motion by government granted (MOT#14) (JUDGE WILLIAMS) (Dkt'd 01/17/83). |
| | | Motion to suppress evidence hearing held (MOT#4) (JUDGE WILLIAMS) (Dkt'd 01/17/83). |
| | | Motion to suppress evidence hearing held (MOT#10) (JUDGE WILLIAMS) (Dkt'd 01/17/83). |
| | | Motion to suppress evidence denied (MOT#10) (JUDGE WILLIAMS) (Dkt'd 01/17/83). |
| | | Motion to suppress evidence denied (MOT#4) (JUDGE WILLIAMS) (Dkt'd 01/17/83). |
| | | Trial date set for 03/17/83 @ 10:00 AM (Counts 1-3, S1-S3) (JUDGE WILLIAMS) (Dkt'd 01/17/83). |
| 03/17/83 | 87 | Stipulation between the government and defendant (FACTS RE: STIPULATED FACTS TRIAL) (JUDGE WILLIAMS) (Dkt'd 03/18/83). |
| | 88 | Minute sheet filed (C/R-JOHNSTON STIPULATION OF FACTS TENDERED RE: TRIAL) (JUDGE WILLIAMS) (Dkt'd 03/18/83). |
| | | Trial begins-bench (Count S1) (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 06/02/83). |

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| | | Trial held-bench (Count S1) (STIPULATED FACTS TRIAL) (JUDGE WILLIAMS) (Dkt'd 06/02/83). |
| | | Bench trial taken under advisement (Count S1) (RE STIPULATED FACTS) (JUDGE WILLIAMS) (Dkt'd 06/02/83). |
| | | Hearing set to 03/23/83 @ 3:00 PM (RE FINDING OF COURT FOR STIPULATED FACTS TRIAL) (JUDGE WILLIAMS) (Dkt'd 03/25/83). |
| 03/23/83 | 90 | Stipulation Filed (STIPULATED FACTS BETWEEN DEFENDANT AND GOVERNMENT.) (JUDGE WILLIAMS) (Dkt'd 03/24/83). |
| | 91 | Minute sheet filed (C/R-LINDA LEWIS) (JUDGE WILLIAMS) (Dkt'd 03/30/83). |
| | | Trial held-bench (Count S1) (JUDGE WILLIAMS) (Dkt'd 06/02/83). |
| | | Trial ends-bench (Count S1) (JUDGE WILLIAMS) (Dkt'd 06/02/83). |
| | | Court judgment of guilty (Count S1) (JUDGE WILLIAMS) (Dkt'd 06/02/83). |
| | | Sentencing set for 05/18/83 @ 3:00 PM (Count S1) (JUDGE WILLIAMS) (Dkt'd 06/02/83). |
| 03/28/83 | 94 | Filed transcript of proceedings for 05/21/81 (Dkt'd 03/31/83). |
| 05/18/83 | 96 | Minute sheet filed (C/R BONNIE CHUFAR) (JUDGE WILLIAMS) (Dkt'd 05/26/83). |

Sentencing of defendant (Count S1) (COUNT S1, 10 YEARS JAIL, 7 YEARS SPECIAL PAROLE, $25,000 FINE, CONTACT PROBATION OFFICE 1ST & 15TH OF EACH MONTH) (JUDGE WILLIAMS) (Dkt'd 06/30/83).

Excludable delay due to hearings on Pretrial Motions began on 05/14/81 and ended on 05/20/81 (Dkt'd 06/03/83).

Excludable delay due to hearings on Pretrial Motions began on 10/08/82 and ended on 05/18/83 (Dkt'd 06/03/83).

Excludable delay resulting from psychiatric/physical competency examination began on 12/13/82 and ended on 01/12/83 (Dkt'd 06/03/83).

Motion made in open court to dismiss (MOT#17) (Counts 1-3, S2-S3) (REMAINING COUNTS) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

Motion to dismiss hearing held (MOT#17) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

Motion to dismiss granted (MOT#17) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

Dismissed (Counts 1-3, S2-S3) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

Order filed (EXECUTION OF SENTENCE STAYED UNTIL FURTHER ORDER OF COURT) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

05/19/83 97 Order filed (JUDGSTATING SENTENCE AS TO INCORRECT COUNT) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

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| 05/20/83 | 98 | Issued judgment and commitment to U.S. Marshal (Count S1) (EXECUTION OF SENTENCE IS STAYED UNTIL FURTHER ORDER OF COURT) (JUDGE WILLIAMS) (Dkt'd 06/03/83). |
| 5/27/83 | 99 | Filed notice of appeal (Count S1) (APPL#1) (FEE PAID) (Dkt'd 06/03/83). |
| 06/02/83 | 100 | Order filed (BAIL PRESENTLY PENDING BE TRANSFERRED TO BAIL PENDING APPEAL, SUBJECT TO REVIEW 6/15/83) (JUDGE WILLIAMS) (Dkt'd 06/07/83). |
| 06/03/83 | | Notice of appeal and docket entries transmitted to USCA (APPL#1) (COPIES MAILED TO PARTIES OF RECORD) (Dkt'd 06/03/83). |
| 06/06/83 | 101 | —(APPL#1) (SCHED: TRANSCRIPTS ORDERED BY 6/10, TRANSCRIPTS FILED BY 6/17, APPELLANT BRIEF BY 7/8, APPELLEE DESIGNATION BY 7/22, APPELLEE BRIEF BY 7/29, REPLY BY 8/12/83) (Dkt'd 06/07/83). |
| 06/10/83 | 102 | Transcript ordered (TRANSCRIPTS ORDERED FOR THE APPEAL) (Dkt'd 06/15/83). |
| 06/15/83 | 103 | Minute sheet filed (C/R-BOESEN) (JUDGE WILLIAMS) (Dkt'd 06/21/83). |
| | | Bail hearing reset to 06/22/83 @ 10:00 AM (IN SAN FRANCISCO) (JUDGE WILLIAMS) (Dkt'd 06/21/83). |

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| 06/16/83 | | —(APPL#1) (USCA #83-1135) (Dkt'd 06/16/83). |
| 06/22/83 | 104 | Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 06/27/83). |
| | | Bail hearing held (JUDGE WILLIAMS) (Dkt'd 06/27/83). |
| | | Bail hearing continued to 07/06/83 @ 10:00 AM (FOR FURTHER REVIEW) (JUDGE WILLIAMS) (Dkt'd 06/27/83). |
| 06/29/83 | 105 | —(APPL#1) (R/T FILED BY 7/18, APPELLANT DESIGNATION BY 8/8, APPELLEE DESIGNATION BY 8/22, APPELLEE BRIEF BY 8/29, REPLY BY 9/12) (Dkt'd 06/30/83). |
| 07/06/83 | 106 | Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 07/13/83). |
| | | Bail hearing held (JUDGE WILLIAMS) (Dkt'd 07/13/83). |
| | | Bail hearing continued to 07/13/83 @ 10:00 AM (IN SAN FRANCISCO (JUDGE WILLIAMS) (Dkt'd 07/13/83). |
| 07/13/83 | 107 | Minute sheet filed (C/R-SCHILLER) (JUDGE WILLIAMS) (Dkt'd 07/19/83). |
| | | Bail hearing held (BOND APPROVED) (JUDGE WILLIAMS) (Dkt'd 07/19/83). |
| 07/18/83 | 108 | Filed transcript of proceedings for 01/12/83 (Dkt'd 07/19/83). |
| 07/28/83 | 109 | —(APPL#1) (USCA ORDER EXTENDING TIME TO FILE TRANSCRIPTS UNTIL 8/15/83) (Dkt'd 07/28/83). |

09/07/83 110 —(APPL#1) (TRANSCRIPT TO BE FILED BY 9/9/83. DESIGNATION DUE 9/30/83, APPELLEE'S DESIGNATION DUE 10/14/83, APPELLEE'S BRIEF DUE 10/21/83, REPLY BRIEF DUE 11/4/83.) (Dkt'd 09/08/83).

09/08/83 111 Order filed (FOR ISSUANCE OF WARRANT FOR FAILURE TO MEET CONDITIONS OF BAIL.) (JUDGE WILLIAMS) (Dkt'd 09/15/83).

Bench warrant issued (JUDGE WILLIAMS) (Dkt'd 09/15/83).

09/16/83 112 Magistrate's criminal minutes filed. (NOT REPORTED) (MAGISTRATE LANGFORD) (Dkt'd 09/19/83).

Motion made in open court for bail pending appeal (MOT#18) (MAGISTRATE LANGFORD) (Dkt'd 09/19/83).

Motion for bail pending appeal granted (MOT#18) (DFT TO REPORT TO PROBATION OFFICE IN SJ) (MAGISTRATE LANGFORD) (Dkt'd 09/19/83).

114 Order filed (RELEASING DFT FROM CUSTODY) (MAGISTRATE LANGFORD) (Dkt'd 09/22/83).

09/20/83 113 Bench warrant returned executed, executed on 09/16/83 (Dkt'd 09/20/83).

09/23/83 115 Order filed (ALLOWING TRAVEL TO EASTERN DIST CA 9/16 AND 18/83—PROVIDED MAG LANGFORD RELEASES DFT FOLLOWING HEARING ON CURRENT VIOLATION) (JUDGE WILLIAMS) (Dkt'd 09/28/83).

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| | 116 | Filed transcript of proceedings for 09/08/82 (Dkt'd 10/04/83). |
| 10/03/83 | 117 | Filed designation for record on appeal (APPELLANT'S) (Dkt'd 10/07/83). |

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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CR NO. 81-0109SW (SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

WILLIAM D. MERCHANT AND CLEO L. MAROHN,
DEFENDANTS.

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VIOLATIONS: 21 USC § 841(a)(1) and § 841(b)(1)(B)(5)—Manufacturing of Phencyclidine; 21 USC § 841(d)—Possession of Piperidine; 18 USC § 4—Misprison of Felonies

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**SUPERSEDING INDICTMENT**

*COUNT ONE:* (21 USC § 841(a)(1) and § 841(b)(1)(B)(5))

The Grand Jury charges: THAT

From in or about August, 1978, up to and including on or about March 3, 1981, at Los Gatos, County of Santa Cruz, Northern District of California,

WILLIAM D. MERCHANT AND
CLEO L. MAROHN,

defendants, did knowingly and willfully manufacture phencyclidine (PCP), a Schedule II controlled substance.

*COUNT TWO:* (21 USC § 841(a)(I) and § 841(b)(1)(B)(5))

The Grand Jury further charges: THAT

On or about March 3, 1981, at Los Gatos, County of Santa Cruz, Northern District of California,

WILLIAM D. MERCHANT AND
CLEO L. MAROHN,

defendants, did knowingly and willfully possess approximately 90 pounds of piperidinocyclohexanecarbonitrile (PCC), a Schedule II controlled substance, with intent to manufacture phencyclidine.

*COUNT THREE:* (21 USC § 841(d))

The Grand Jury further charges: THAT

On or about March 3, 1981, at Los Gatos, County of Santa Cruz, Northern District of California,

WILLIAM D. MERCHANT AND
CLEO L. MAROHN,

defendants, did knowingly and willfully possess approximately 190 gallons of piperidine with intent to manufacture phencyclidine.

*COUNT FOUR:* (18 USC § 4)

The Grand Jury further charges: THAT

On or about March 3, 1981, at Los Gatos, County of Santa Cruz, Northern District of California,

CLEO L. MAROHN,

defendant, having knowledge of the actual commission by William D. Merchant of felonies cognizable by a court of the United States that is, the manufacture of PCP, a Schedule II controlled substance and the possession of PCC, a Schedule II controlled substance, with intent to manufacture PCP and the possession of piperidine with intent to manufacture PCP, willfully did conceal the same and did not, as soon as possible, make known the commission of these felonies to any Judge or other person in civil or military authority under the United States.

A True Bill.

_____

*Foreperson*

_____

G. WILLIAM HUNTER
*United States Attorney*

(Approved as to form: __)
AUSA:JFP

MUNICIPAL COURT OF CALIFORNI[illegible]OUNTY OF SANTA CRUZ
SANTA CRUZ COUNTY JU[illegible]CIAL DISTRICT

**CONDITIONS OF PROBATION**

**FILED**

(Date) [illegible]

CLERK OF THE MUNICIPAL COURT

By [illegible] Deputy

THE PEOPLE OF THE
STATE OF CALIFORNIA vs

David William Merchant Defendant

Case No CR-15714

Date 11/4-83

Judge J. A. Merlo

Fine Distribution 5/a C&P

The above named defendant having been convicted of a misdemeanor violation of Section 417 PC 417b PC

IT IS HEREBY ORDERED (applicable items checked)

A. COURT ACTION

( ) Sentenced to _____

( ) Execution of sentence suspended for a period of _____

(X) Imposition of sentence suspended for a period of 3 yrs

(X) PROBATION GRANTED under the supervision of the Probation Officer for a period of Three years from date of this order

( ) SUMMARY PROBATION GRANTED for a period of _____ from date of this order

( ) PROBATION MODIFIED Original terms in full force except as amended herein.

( ) PROBATION REVOKED Defendant found in violation of probation.

( ) BENCH WARRANT ordered BAIL $ _____

( ) PROBATION REINSTATED Original terms in full force except as amended herein

( ) PROBATION EXTENDED to expire _____

B. CONDITIONS OF PROBATION:

(X) Obey all laws.

(X) BE CONFINED in the County Jail 10 days/months, 417 PC

(X) 20 days/months suspended.

( ) CREDIT for _____

(X) STAY OF EXECUTION granted to 12-13-83, 7:30 am and defendant ordered surrender to the Sheriff at that time.

( ) CONFINEMENT to be served _____

( ) Appear Sheriff's Dept. for processing on _____

(X) Work furlough/school program recommended.

( ) Not to be under influence of alcohol at time of reporting for or during confinement.

( ) PAY A FINE OF $ _____ plus A P $ ___ TOTAL DUE $ ___

( ) Suspend payment of $ _____ plus A P $ ___ Bal Due $ ___

( ) Credit of $ _____ for ___ days served Bal Due $ _____

( ) TO BE PAID to the CLERK of the Court as follows _____

( ) TO BE PAID through the Adult Probation Office

( ) IN DEFAULT of payment of fine, serve one day in the county jail for each $30 not paid.

( ) MAKE RESTITUTION to the victim in the amount of $ _____

( ) Payable through the Adult Probation Office

( ) Complete _____ hours of Volunteer Service and return to Court on _____ at 8 30 a m for Proof of Completion

( ) Within five days call the DWI Director 429-4534 for instructions on th Drinking Driver course and complete without interruption Pay the furthe of $ _____ Course will be ( ) 4 weeks, ( ) 8 weeks

(X) Participate in an educational, vocational or therapeutic program directed by the Probation Officer.

(X) Submit person, vehicle, place of residence to search and seizure at an time of day or night, with or without benefit of warrants as directed b probation officer or any peace officer.

( ) Project Busy

( ) Submit to periodic drug/alcohol testing if directed by probation officer peace officer.

( ) Totally abstain from use of alcohol/intoxicants.

( ) Shall avoid places where alcohol is the chief item of sale.

( ) Submit to chemical test if stopped for driving while under the influence

( ) Shall not drive a motor vehicle unless properly licensed.

( ) License suspended for a period of _____

( ) Review date: _____

(X) Other not possess any firearms during period of probation

Order for weapons to be destr

JUDGE OF THE MUNICIPAL COURT

I certify the foregoing is true copy of the order judgment rendered on the above date by the above-named Judge.

JANET OLIVAS, CLERK OF THE ABOVE NAMED COURT. By _____, Deputy

DEFENDANT MUST ABIDE BY ADDITIONAL TERMS AND CONDITIONS OF PROBATION AS SET FORTH ON REVERSE OF THIS FORM.

I have received a copy, read and understand the above conditions of probation

David Merchant Defendant.

Address: _____

Telephone No. _____

MC 33 (Rev. 4/79)

White - File
Green - Jail
Canary - APO
Pink - D A.
Goldenrod - Defendant

I hereby certify the foregoing instrument is a correct copy of the original on file in this office.
DATED: 5-17-84
Robert Wernette, County Clerk
By [illegible] Deputy

BEST AVAILABLE COPY

MUNICIPAL COURT OF CALIFORN
COUNTY OF SANTA CRUZ, SANTA CRUZ COUNTY JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff

vs

David William Marchant, Defendant

CHARGES 417 PC 417b PC

AGENCY

NEXT COURT APPEARANCE DATE

at

**NOTICE, SENTENCE, COMMITMENT, PROMISE TO APPEAR, BAIL FORM**

Case No CR-15714

Date & Time November 14, 1980 at 10AM

Type of Hearing probation report/sentence

Judge Marlo motion new trial

Reporter Harbin

D.A. Patty Phelan

☒ Defendant present ☐ not present ☐ without attorney ☒ with/by attorney Zac Tur.

☐ Appoint P D ☐ Obtain attorney ☐ Pretrial conference ☐ Diversion terminated

☐ Continued arraignment ☐ Jury Trial ☐ Court Trial ☐ Pay $ _____ Attorney Fees

☐ plea dispo. ☐ Preliminary Examination ☐ Case dismissed

☐ O/R Hearing ☐ Bail Review ☐ Report to Probation Dept. ☒ Probation granted 3 yrs Formal

☐ Not Guilty by plea/verdict ☐ Diversion Hearing ☐ Bench warrant ordered. Bail $ ___

☐ Guilty by plea/verdict ☐ Probation/Sentencing ☐ Bench warrant ordered set aside

☐ Setting ☐ Test Results

☐ Nolo Contendere ☐ waives time ☐ deny/admit prs. ☐ waives rights

Appeal on 2nd Count - fail - upon Count

**CUSTODIAL STATUS BEFORE SENTENCE**

☐ Remanded to custody of Sheriff until next appearance. Bail $ _____

☐ Remain at liberty on bail ☐ Remain at liberty on O/R ☐ Released on O.R. ☐ Ordered discharged

**SENTENCE AND CUSTODIAL STATUS**

Jail: Serve 18 ~~days~~/months ☒ 12 ~~days~~/months suspended (1yr - 417BPC 6m - 417A)

☐ Credit for time served pursuant to PC2900.5

☐ To be served consecutively/concurrently with

☐ Sentence to be served

☒ Work furlough program

☒ Stay of execution granted to 12-17 @ 7:30 Am and defendant ordered to surrender to Sheriff at that time.

☐ Appear Sheriff's Dept. on for processing for Weekend Program.

☐ Resume weekend

☐ FINE Pay fine of $ _____ OR ☐ spend one day in jail for each $30.00 of fine unpaid. ☐ Fine due forthwith.

☐ Suspend payments of $ _____ plus A P $ _____ ☐ Payments granted

☐ Remanded to custody of Sheriff until sentence is satisfied in full. Stay of execution

☐ Resume Payments ☐ Account Card

SHOW PROOF OF (Compliance will vacate appear date) CODE

☐ Fine Paid in Full ☐ Valid Driver's License ☐ _____ hrs. Volunteer Work

☐ Traffic/Drink-Drive Class ☐ $ _____ Restitution Made ☐ Sentence Suspended

☐ Other

Argument re Reg Ltr. Denied. - Motion to Set Aside Conviction. Granted. Person to be released under own recognizance. Bail Exonerated. Not to leave jurisdiction during probation. Report to be completed by Dec 12, 1980.

**BAIL**

$ _____ Cash Bail Bail Bond No.

☐ Exonerated ☐ Forfeited ☐ Forfeiture set aside ☐ Other

I certify the foregoing is a true copy of the order judgment rendered on the above date by the above-named Judge.

CLERK OF THE ABOVE NAMED COURT By _____, Deputy

**PROMISE TO APPEAR:**

DEFENDANT, BEING RELEASED ON HIS OWN RECOGNIZANCE, AGREES THAT: (a) He will appear at all times and places as ordered by the Court or magistrate releasing him and as ordered by any Court in which, or any magistrate before whom, the charge is subsequently pending. (b) If he fail to so appear and is apprehended outside the State of California, he waives extradition. (c) Any Court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurances of his appearance as provided in part 2, title 10, chapter 1 of the Penal Code.

Executed on By _____, Defendant

DISTRIBUTION: WHITE - JAIL, GREEN - FILE, CANARY - CJIC, PINK - D A , GOLDENROD - DEFENDANT

SMC 41 (REV 8/77)

(Performance bond; able to be out pending appeal)

I hereby certify the foregoing instrument is a correct copy of the original on file in this office. SANTA CRUZ COUNTY JUDICIAL DISTRICT

DATED: 5-12-81 Robert Wandruff, Clerk

By Jacqueline Seyfried, Deputy



BEST AVAILABLE COPY

IN THE MUNICIPAL COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CRUZ

---

NO. CR 15714

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF,

*v.*

DAVID WILLIAM MERCHANT, DEFENDANT

---

**REPORTER'S TRANSCRIPT OF SENTENCING HEARING**
**COURTHOUSE ANNEX, WATSONVILLE, CALIFORNIA**
**NOVEMBER 14, 1980**
**BEFORE THE HONORABLE JOHN A. MARLO, JUDGE**

---

**APPEARANCES**

For the People: PATRICIA BAZAR
Deputy District Attorney

For the Defendant: SAM L. FOSTER
Attorney at Law
1084 Cass Street
Monterey, CA 93940

Margaret J. Harbin, CSR
Official Court Reporter C2806

FRIDAY, NOVEMBER 14, 1980 10:00 A.M.

[2] **PROCEEDINGS**

THE COURT: We will proceed with the Merchant matter. The Court has received two letters; one from Mr. Payne, and one from Dr. Anderson submitted by defense counsel. This is the time set for probation report and sentencing.

MS. BAZAR: I would just like to state to the Court that—I realize it came up last time when we were present in court that the Court had received a number of letters from people in regards to sentencing, some of which were marked "Personal and Confidential." I have thought very seriously about the matter and in all fairness to the individuals who wrote the letters, I feel I have to respect their wish for privacy and confidentiality. Therefore, I would simply ask that the Court disregard any letters that he received and sentence Mr. Merchant based only on the probation report, his previous criminal record, arguments made in court today and the facts in the case itself.

THE COURT: All right. Mr. Foster, do you wish to present any evidence at this time?

MR. FOSTER: No. I have no evidence to present, your Honor.

THE COURT: Are you prepared then for the imposition of sentence?

MR. FOSTER: Yes, your Honor.

[3] MS. BAZAR: Your Honor, I would like to address a recommendation, the People's recommendation for the sentencing, since it does differ slightly from the probation report. Our preference in this matter would be that Mr. Merchant be sentenced to six months in the County Jail on the 417 that he was convicted of and that the entire year in jail that he could possibly do on the 417 be suspended, he be given three years formal probation and no guns and a search provision. I believe that differs slightly from the probation report in that they recommended 365 days, 240 suspended. We would prefer that the six months be given

in full on the 417 and the entire year remain on the 417(b). The purpose of which obviously is I think it would be to State's benefit to have the maximum amount of control over Mr. Merchant over the next three years.

THE COURT: Mr. Foster, do you wish to comment on that? That is exactly what I had written in my notes.

MR. FOSTER: Oh, I guess it is not going to make any difference.

THE COURT: That is what I was thinking myself as a sentence.

MS. BAZAR: I was not aware of what the Court's sentence was going to be.

THE COURT: No. It is on my file. I felt, and the reason for that is I think the maximum time as it were suspended is going to be of more benefit than spending [4] 240 days in the County Jail. It is just a long ongoing problem, and I would like to see it corrected; and I am sure Mr. Merchant would, too.

MR. FOSTER: I would, too, your Honor. The problem that I have, and I realize the Court—and I respect the Court's judgment in this matter—and I realize it feels it has responsibilities both ways; that is to Mr. Merchant as well as to society. I just have to tell the Court that my experience of David and his family has been only—and this isn't coming from advocacy, I am not pitching you at all—is he has been a loving man, he has been very, very kind with his family. I have seen him come to the assistance of a young juvenile that was charged with a crime in Santa Clara County and take the responsibility of getting me involved and having his family take care of the legal fees, and we got a lie detector test and that young man's innocence was proven. He went to bat for that individual. I have never seen David in a state like this nor have I ever talked to anyone other than the people that he has had conflict with that have stated anything like that,

and I realized that under the circumstances of this case that he was—it was unusual circumstances, and he was found guilty.

The thing that I feel that is highly contradictory of any attempt to hurt anyone or even threaten anyone is his conduct in actually seeing the police officer and walking [5] toward him and throwing the gun away and coming toward the police officer in a peaceful manner rather than holding the gun and threatening him as he did. It is highly incredible that David would do that, and I believe the police officer actually believed what he saw. I don't think he is lying or trying to hurt David or make up anything that would be to David's detriment. In fact, I saw those two gentlemen talking peaceably about the circumstances. I think the police officer had in his head that there was a wild man out there and then when he saw the situation, he probably drew that conclusion. I think it was a fair conclusion for him to draw. I realize that I am stuck with the verdict. I just would think that one of the benefits rather than placing him in custody for this long period of time would be to look at the alternative of a substantial period of time over his head and allow David either to do community service, if that's physically possible, or to pay a large fine and have the Court control him from that standpoint. I think time in custody under the circumstances of this case didn't really serve the benefit of this County nor David or anyone else. And I can see your point of view of cut time and suspended time so I would just submit it on that basis.

THE COURT: If I were to judge Mr. Merchant with the contacts with him in court, I would agree. In fact, in the last situation that he had was the same. His demeanor [6] and approach in court is certainly inconsistent with what he does with guns, but that's what concerns the Court is this gun business.

THE DEFENDANT: Your Honor, no one has ever claimed I tried to hurt anybody with a weapon. No one has ever even made that claim.

THE COURT: Well, this incident—

THE DEFENDANT: I am sure as a former police officer in your own mind there is a distinct line. You had many times the opportunity when you could fire or not fire. When I ran a motorcycle shop in San Jose, I had a loaded shotgun behind the door and a guy came in and robbed me and turned his back to me and walked out, and I had the option and certainly the right, having been just armed robbed, that I could have shot him. Instead, I let him walk out the door, and I called the police because the alternative with him having a loaded gun in his hands was either shoot him dead or let him go and it turns out they caught him three blocks down the street. But my willingness to harm someone is a long way from my willingness to attempt to protect my property. And as Mr. Foster says, I think that the policeman believes—I talked to him when everybody else was gone—and he believes that's what he saw.

THE COURT: What really scares me, Mr. Merchant, in my role in protecting the community is that you are just that close in certain instances to violence being [7] committed, and you are just not a man that should have or be near any guns at all.

THE DEFENDANT: I would be more than willing to say I have some provision—

THE COURT: I made that a provision before.

THE DEFENDANT: Which I complied with to the extent that it cost me several thousand dollars.

THE COURT: But here we are again three years down the road with the same problem and had the officer acted any differently, you might have been the recipient of some bloodshed. That is the scarey [*sic*] thing about you and guns.

THE DEFENDANT: That is very true, sir.

THE COURT: Well, I am going to impose sentence at this time. I am going to place the Defendant on three years of formal probation. As a condition of probation Defendant is to—will receive a one year jail sentence for violation of 417(b) of the Penal Code. That sentence will be suspended. The Court will impose a jail sentence of six months on the violation of Section 417 which sentence is to be served as a condition of probation which means there will be a total of eighteen months and twelve months will be suspended. One of the conditions of probation will be that the Defendant submit his person, residence or vehicle to search and seizure at any time of the day or night by a peace officer with or without a warrant. As having in the probation report to participate in a [8] counseling program as directed by the Probation Officer and not to possess any firearms during the period of probation.

MS. BAZAR: Is that search only extended to his person and his vehicle and not his residence?

THE COURT: I have person, residence and vehicle. I am just reading it from the report.

MS. BAZAR: Fine, I didn't catch the residence.

THE COURT: And I think you will find, Mr. Merchant, that the six month sentence is less than six months. Actually, I think it is four months.

THE DEFENDANT: Well, what this means to me is everything I own.

THE COURT: Well, that is not my intention to do that, Mr. Merchant.

THE DEFENDANT: I have $1,500 a month tractor payments which I cannot make in jail.

THE COURT: I will give you a stay of execution to allow you to enter any work furlough program. I don't want anyone to lose their job.

MR. FOSTER: What I would like to do, your Honor, I do feel strongly about the second Count so I would like to file a Notice of Appeal, if I could at this time.

THE COURT: Yes. The sentence will be stayed pending your appeal.

MR. FOSTER: Do you want bail set on that or do you want to remain OR?

[9] MS. BAZAR: Your Honor, we ask bail be set and bail be set quite high. I have all of Mr. Merchant's old files, and I find out of six files he has failed to appear on at least four of them at different points.

THE COURT: I don't recall him ever failing to appear in my court on anything.

MS. BAZAR: I don't know if they were in your court or not. They may have been when they were still in front of Judge Kessell. I do not know.

MR. FOSTER: My experience with Mr. Merchant he has always kept his agreement to be in court, and I have never—he has lived here for many years.

THE COURT: I am not going to set bail. He has made his appearances in this matter to my knowledge and the other matters.

MR. FOSTER: Your Honor, we will proceed rapidly with the appeal to get that determined.

THE COURT: I should set a date.

MS. BAZAR: I believe the date has to be set for the matters to keep—

THE COURT: I will set the matter for report for confinement on the 13th of December at 7:30 A.M. which is a Saturday. If you are interested in work furlough, even though he is going to file an appeal, you should contact the Probation Office as soon as possible.

MR. FOSTER: If the appeal proceeds, then does [10] the stay continue?

THE COURT: Yes.

MR. FOSTER: Fine. I will get the notice to prepare Clerk's transcript. Thank you. What time is that on the 13th?

THE COURT: 7:30 A.M.

MR. FOSTER: So if I do proceed with the appeal, I just notify with the Court and they will set this time aside.

THE COURT: That is my understanding.

MS. BAZAR: Excuse me, your Honor, there is one other matter. I forgot at the time of trial to ask the Court to please order the destruction of the weapon itself, an administrative thing that has to be done.

THE COURT: It will be destroyed instead of sold like the last one.

MS. BAZAR: Fine.

THE DEFENDANT: That is a $1,000 weapon.

THE COURT: Is this a different weapon that [*sic*] was used the last time?

MR. FOSTER: .38.

THE COURT: From the one he was put on probation.

MR. FOSTER: These are required to be destroyed under the Code.

MS. BAZAR: The weapon that is involved in this case is the same gun that he was—

[11] THE COURT: I thought he was going to sell that.

MS. BAZAR: It was sold. Apparently somewhere along the line it was returned to Mr. Merchant.

THE COURT: I would like that pursued because that attorney represented it would be sold.

MS. BAZAR: Your Honor, it is being pursued by our office.

THE COURT: I would like to know how he ended up with the gun. If the attorney is the one who bought it, there may very well be some ethical standards violated by counsel. I don't know.

THE DEFENDANT: He did not provide me with a weapon. It went a number of other ways. Is it possible it could be ordered sold to a gun dealer in Los Angeles?

THE COURT: We did that last time, and you ended up with the gun. It is going to be destroyed.

MS. BAZAR: Thank you.

THE COURT: You have another matter, CR-13431.

MS. BAZAR: Your Honor, I hesitate to dismiss this pending the outcome of the appeal.

MR. FOSTER: That is all right. We will waive time on it and wait for the outcome of the appeal.

MS. BAZAR: If that's all right with the Court.

THE COURT: Why don't I continue it for further proceedings on January 15th at 9:15.

MS. BAZAR: Fine.

IN THE MUNICIPAL COURT OF SANTA CRUZ COUNTY JUDICIAL DISTRICT COUNTY OF SANTA CRUZ, STATE OF CALIFORNIA

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NO. CR-15714

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,

*v.*

DAVID WILLIAM MERCHANT, DEFENDANT.

---

**NOTICE OF MOTION FOR CLARIFICATION AND/OR MODIFICATION OF STAY OF JUDGMENT AND POINTS AND AUTHORITIES IN SUPPORT THEREOF**

---

TO: SAM L. FOSTER, ATTORNEY AT LAW:

PLEASE TAKE NOTICE that on February 18, 1981, at 10:00 a.m. in Department A, or as soon thereafter as the matter can be heard, the People will move for a clarification and/or modification of the Municipal Court's stay of execution issued in this matter.

The motion will be based on this Notice of Motion and the attached Points and Authorities.

DATED: February 11, 1981.

ARTHUR DANNER III
*District Attorney*

By /s/ PATRICIA A. BAZAR
Patricia A. Bazar
*Assistant District Attorney*

## MEMORANDUM OF POINTS AND AUTHORITIES

### FACTS

On September 25, 1980, a jury found defendant guilty as charged on two counts for violating Section 417 and 417(b) of the Penal Code. On October 30, 1980, defendant was sentenced to 6 months in county jail and 3 years of formal probation with 1 year on county jail suspended and a search clause. When defendant filed an appeal from these convictions, the trial court issued an ex parte order staying execution of the judgment.

### ARGUMENT

Section 1467 of the Penal Code provides:

> "An appeal from a judgment of conviction does not stay the execution of the judgment in any case unless the trial or a reviewing court shall so order. The granting or refusal of such order shall rest in the discretion of the court."

The statute thus provides that execution of a judgment is not stayed pending an appeal unless the court explicitly so orders. The decision whether to grant such a stay rests in the trial court's sound discretion and an abuse of that discretion will rarely be found by an appellate court, particularly where the appeal is frivolous. See the cases of *People v. Bryan* (1970) 3 CA3d 327, 343, *People v. Sullivan* (1952) 110 CA2d 4, *People v. Williams* (1958) 162 CA2d 141, and *People v. Rodgers* (1940) 38 CA2d 360, construing Section 1243 of the Penal Code, a similar statute applicable to appeals from Superior Courts.

In addition it would appear that an order granting probation is not stayed unless the court explicitly so orders, *In re Stallings* (1970) 5 CA3d 322. Section 1243 of the Penal Code distinguishes the execution of a judgment from the execution of an order granting probation. Thus, an order

granting probation could conceivably go into effect, if not expressly stayed, even though execution of the rest of the judgment was stayed. Although Section 1467 does not mention orders granting probation, the results should be the same under two such similar statutes.

The stay order issued in this case, however, is not clear as to whether or not the probation was stayed along with the rest of the judgment. If the Court intended to stay only the remainder of the judgment and allow the probation to go into effect, the People ask that the order explicitly so state.

If, on the other hand, the trial court originally intended to stay the entire judgement, the People respectfully request that the Court reconsider that decision and exercise its discretion in light of the facts that now exist. Since the stay was issued, defendant has appealed from both counts on which he was convicted, rather than just one. If he had appealed only one count, the probation ordered on the second count would probably have taken effect. Now that both counts have been appealed, however, the probation is ostensibly affected by the stay. In addition the brief filed by defendant on his appeal shows that his contentions lack both merit and support in the law. Thus, his conviction will probably be affirmed on appeal. Therefore, the People ask that the Court modify its stay on execution to allow the probation granted to be instituted.

## CONCLUSION

On the basis of the foregoing Points and Authorities the People respectfully request that the Court clarify and/or modify its stay of execution to permit the ordered probation to be instituted pending defendant's appeal.

Dated: February 11, 1981.

ARTHUR DANNER III
*District Attorney*

By PATRICIA A. BAZAR
*Patricia A. Bazar*
*Assistant District Attorney*

(Proof of Service by Mail – 1013a, 2015.5 C.C.P.)

**PROOF OF SERVICE**

STATE OF CALIFORNIA )
) ss.
COUNTY OF SANTA CRUZ )

I am a citizen of the United States and a resident of the County aforesaid. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 701 Ocean Street, Room 250, Santa Cruz County Governmental Center, Santa Cruz, California, 95060. On February 11, 1981, I served a copy of the within _____ NOTICE OF MOTION FOR CLARIFICATION AND/OR MODIFICATION OF STAY OF JUDGMENT AND POINTS AND AUTHORITIES IN SUPPORT THEREOF _____

_____

on the interested party(ies) in said action by placing a true copy thereof fully prepaid in the United States mail at Santa Cruz, California and addressed as follows:

Sam L. Foster, Esq.
Attorney at Law
1084 Cass Street
Monterey, CA 93940

I, LYNN LEWIS, certify under penalty of perjury that the foregoing is true and correct.

/s/ LYNN LEWIS
Lynn Lewis

DAO 362

**[COVER PAGE TO PARTIAL TRANSCRIPT OF PROCEEDINGS OF APRIL 29, 1981]**

MUNICIPAL COURT OF THE SANTA CRUZ COUNTY JUDICIAL DISTRICT COUNTY OF SANTA CRUZ, STATE OF CALIFORNIA

---

No. _____

PEOPLE OF THE STATE OF CALIFORNIA PLAINTIFF,

*v.*

DAVID WILLIAM MERCHANT DEFENDANT

---

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**
**COURTHOUSE ANNEX, WATSONVILLE, CALIFORNIA**
**APRIL 30, 1981**
**BEFORE THE HONORABLE JOHN A. MARLO, JUDGE**
**(Continuation of April 29, 1981)**

---

**APPEARANCES**

For the People: THOMAS KELLEY, ESQ.,
Assistant District Attorney

For the Defendant: MICHAEL STEPANIAN, ESQ.,
Attorney at Law

LINDA LEAVITT, ESQ.,
Attorney at Law

Reported by: CORINNE M. KAITZ
Shorthand Reporter

Case No. CR 15715

[167] * * * * *

PATRICIA BAZAR

called as a witness on behalf of the Plaintiff, was duly sworn, and testified as follows:

**DIRECT EXAMINATION**

BY MR. KELLEY: Will you state your full name?

A. Patricia Bazar.

Q. You are an Assistant District Attorney, County of Santa Cruz?

A. I am.

Q. Are you the prosecuting attorney in CR 15714?

A. If that's the 417 and 417(b) which was tried in November, yes.

Q. You are the attorney who tried that and prepared the sentencing?

A. Uh-huh (indicating yes).

Q. Did you seek a clarification of the sentencing which happened on November 14th last year?

A. Yes.

[168] Q. And prior to that actual hearing on the clarification, what, if anything, had been happening in regard to this case, that you have personal knowledge of?

A. Well, since the sentencing itself, we were getting – I was talking to the neighbors.

MR. STEPANIAN: I will object to these statements. First of all, the question is vague, what was happening in this case since then; and I would say they are hearsay statements and have no relevancy.

THE COURT: Sustained.

BY MR. KELLEY: Q. Did you recieve phone calls from the neighbors surrounding the address at 25977 Highland Drive, Santa Cruz?

MR. STEPANIAN: Again, your Honor. I would say it's a leading question and calls for a hearsay statement, so I'd ask the question and potential statement be stricken.

MR. KELLEY: Statements will be offered solely for probable cause to explain subsequent action, not for the proof of them. His point is well taken there.

MR. STEPANIAN: Your Honor, this is a probation search which, as far as what probable cause that's been testified to, as far as her getting these statements before the clarification, I think it's getting pretty far afield. And for the purpose of probable cause, I do—

THE COURT: I'm going to sustain it. We have already gotten into the actual discussion of the search warrant. [169] I am going to sustain it.

MR. KELLEY: On what grounds?

THE COURT: On the basis that it was hearsay.

MR. KELLEY: It's not being offered for the truth of the matter. If a person has a search clause, you can't go execute it because it's there. You have to have reasonable grounds.

THE COURT: I understand that, but we have already done that.

MR. KELLEY: So you're ruling it cumulative?

THE COURT: Yes.

BY MR. KELLEY: Q. May I ask if you took some of the calls personally?

A. Yes.

Q. And you communicated that information to police officers?

A. Yes.

Q. And did you accompany them on the execution of that probation search clause?

A. Yes, I was there on the first day and drove by on the second day.

Q. All right, and on the first day, at some occasion, did you have a phone conversation?

A. Yes, I did.

Q. With Sam Foster?

A. Yes, I did.

Q. And after the phone conversation, what happened between you and Mr. Merchant, if anything?

[170] A. I don't know that anything happened specifically between Mr. Merchant and myself after that conversation. The conversation was sort of a three-way conversation. Mr. Merchant originally called Mr. Foster and then at one point gave the phone to me. I talked to Mr. Foster, gave the phone back to Mr. Merchant, he talked to Mr. Foster, gave the phone back to me. I was the individual who eventually terminated the conversation.

Q. Did you have any directive given to Mr. Merchant that there would be a search at that time for guns?

A. Directive? To whom?

Q. Any peace officer.

MR. STEPANIAN: Object.

THE COURT: Sustained.

BY MR. KELLEY: Q. What, if anything, did you observe the defendant doing after the phone call with Mr. Foster?

A. Well, he stated that the guns were only in two rooms and he wanted to take the officers to just those two rooms and stated he would get the guns from the two rooms and simply said more than once that they were only in two areas of the house.

Q. Okay, and were his wishes followed, to your knowledge?

MR. STEPANIAN: Your Honor, I assume these are hearsay statements. I thought they were for probable cause.

MR. KELLEY: They are admissions by the defendant [171] that he in fact had the guns.

MR. STEPANIAN: Excuse me, we can explore that later. But I will object to them.

THE COURT: Objection will be noted.

BY MR. KELLEY: Q. After he made those statements, what happened?

A. Well, initially they—he went with two or three of the officers to a room in the upstairs and they began to bring guns down.

Q. How long—what happened at that point?

A. At that point, one of the officers found a gun in an area which was not in the two locations that Mr. Merchant said they were going to be, and at that point a more, I don't know, generalized search of areas in the house other than the original two rooms began to take place.

MR. KELLEY: Thank you. That's all.

**CROSS-EXAMINATION**

BY MR. STEPANIAN: Q. Did you have a conversation with Mr. Danner sometime before this motion to—that was heard on February, concerning the search and seizure clause, which was had in this courtroom?

A. Are you speaking about the Motion to Clarify?

Q. Well, I see here you made a Notice of Motion for Clarification and/or Modification of Stay of Judgment and Points and Authorities in Support Thereof. I am going to show you a copy of a motion that is signed by you [172] which is a Notice of Motion for Clarification and/or Modification. Are you familiar with this document?

A. Yes, I am.

Q. Did you write it?

A. I wrote portions of it. I had a law clerk in our office write portions of it.

Q. Did you yourself write the factual matters in the case and the law clerk researched the law?

A. I remember giving her the information, I don't specifically remember which of us—she wrote out the majority of the motion. I did some preliminary research and gave her the factual scenario.

Q. Put it this way. Which cases did you write?

MR. KELLEY: Objection as to relevancy.

THE COURT: Overruled.

BY MR. STEPANIAN: Q. In other words, you gave a general outline to a law clerk. You gave the law clerk an idea on what you wanted to do in this case; is that correct?

A. I gave her a factual situation and some preliminary research I had done on the issue; I wanted her to research. I explained what kind of motion I wanted and asked her to write me a motion. She turned one in to me. I went over it, asked her, I believe, to clarify a couple points in it, and approved it, had it typed up by my secretary.

[173] Q. Did you have a discussion with Mr. Danner, who is your boss, prior to giving those instructions to the law clerk?

A. About that motion specifically?

Q. Yes.

A. Not about that motion; about the fact that I was attempting to figure out a solution to the problem that resulted in that motion, yes.

Q. What was the problem? In other words, you basically wanted to put, to make sure the search condition was in effect; is that correct?

MR. KELLEY: Object to the relevancy of the whole area. We have been over this.

THE COURT: Not with this witness. Overruled.

BY MR. STEPANIAN: Q. You wanted to make sure that the search condition was in effect; is that correct?

A. No, what I discussed specifically with Mr. Danner was—

Q. I am not talking about Mr. Danner, I am saying this motion. You wanted to make sure—

A. I wanted to clarify that stay of execution, yes.

Q. Whether by clarification, modification, or reinstatement; is that correct?

A. More or less.

Q. When you went to Mr. Danner and you spoke to Mr. Danner about this—

A. I didn't speak to him specifically about the motion. I [174] spoke to Mr. Danner earlier when I asked him some general questions on what his understanding of the law was in regard to the affect of an appeal on a sentence and what specifically a stay of execution meant. Jurisdictional questions, things on those lines. Explained to him my problem to see if he had ever come in contact with a situation like that before.

Q. You mean where there was a stay order on appeal and the basic question being does this in fact stay the probation, the search clause, either, correct?

A. I don't even know if I defined it that fully. I wanted to know from him if he had ever had a situation where an individual had been convicted and sentenced, had taken the matter up on appeal, but there was still the same type of problem occurring in the period before the appeal had been heard and what do you do about it at that point.

Q. Concerning the fact that, well, you are not sure on whether the search and seizure clause in the original sentence was in effect; is that correct? You are not sure about that?

A. At the time I spoke to Mr. Danner, I wasn't. I wasn't sure what the effect of the stay was.

Q. What happened was you had a conversation with Mr. Danner. Did he give an opinion to you?

A. Yeah, well, he gave me an opinion. His opinion was that he had never encountered it and why didn't I ask Joyce, [175] the law clerk.

Q. And at that point, did you ask Joyce, the law clerk; and did you go and ask Joyce, the law clerk?

A. No, he gave me some ideas on where to look and the portion of the Penal Code, and I went and looked at that and some of the statutes on appeal and tried to get the situation a little clearer in my mind. And I ran across some

cases, specifically on the extent of the stay, and that's when the idea of a motion for clarification seemed like an appropriate way to go.

Q. Fine. Now did you speak to Judge Marlo at all concerning your problems as to what the interpretation of the stay was?

MR. KELLEY: This was prior to the motion?

MR. STEPANIAN: Prior to the filing of this motion.

THE WITNESS: I don't recall. As I recall, I think I saw him and mentioned that I had filed a motion.

BY MR. STEPANIAN: Q. Did you mention on what the motion was that you had filed?

A. Well, that it was for clarification of the stay, yes.

Q. And did you ask the Judge when this could be heard?

A. No, because that was one of the problems. I forgot to get a waiver of the ten-day time period and I didn't get my motion filed in time. So we had to extend the first deadline.

Q. And then you sort of discussed the time on this as far as [176] his order shortening time?

A. No, I noticed the motion and gave the particular date but I didn't give the requisite ten-day notice. And I didn't discuss it with Judge Marlo because when I came into court, I was informed I hadn't complied with the ten days and we set it for a date later in the month.

Q. Was Mr. Foster there?

A. No.

Q. So when you made a motion for clarification at that point, did you notify Mr. Foster?

A. Yes.

Q. Mr. Foster was not there at that time, correct?

A. No.

Q. But you were ready to proceed on this motion; is that correct?

A. Well, I had hoped Mr. Foster would be here even though I hadn't complied with the ten days' notice.

Q. But in fact, they were not here. Would you have proceeded with this motion if the Judge would have heard it?

MR. KELLEY: Argumentative and calls for speculation.

THE COURT: Overruled.

BY MR. STEPANIAN: Q. You said you tried to begin the motion but there wasn't a compliance with the ten-day rule; is that right?

A. I came down here hoping that Mr. Foster would appear and we could discuss the motion. He didn't. I couldn't [177] proceed with it and admitted I'd forgotten to get the ten days, and the Court set it over to I think the 27th. And I followed up with a letter to Mr. Foster's office telling him the matter had been continued.

Q. And then it was ultimately heard, correct?

A. Yes.

Q. There was no points and authorities filed in this motion?

A. None that I have received.

Q. Did you have a discussion with the Judge after that hearing in which Mr. Foster was not present concerning what was in this motion?

A. No.

Q. Did you then notify him, send him a letter and set forth another hearing date?

MR. KELLEY: Referring to Mr. Foster?

MR. STEPANIAN: Referring to Mr. Foster.

THE WITNESS: If I remember correctly, the Judge set it and made a statement like the Clerk's Office will inform Mr. Foster of the new date. I left, and when I got back to the office, asked my secretary to type up a letter and sent it to him.

Q. Have you had conversations with Officer Shipp prior to filing this motion?

A. I believe I had. I believe I had with Officer Shipp. I am not positive.

Q. Did you have any conversations with the other officer who [178] testified here a few minutes ago?

A. Lieutenant Kirkland?

Q. Yes.

MR. KELLEY: Is this prior to the filing?

MR. STEPANIAN: Prior to the filing of this motion.

THE WITNESS: I believe so.

BY MR. STEPANIAN: Q. Did you have, and did you discuss these conversations or these calls that you had come from neighbors with him?

MR. KELLEY: At what time?

MR. STEPANIAN: Prior to the filing of this motion.

THE WITNESS: Not in any great detail. The only one I discussed it with in any great detail would be an investigator from our office.

BY MR. STEPANIAN: Q. What is his name?

A. Otis Pogue.

Q. Do you recall having a discussion with the lieutenant?

A. It's possible. I don't know if it was before I noticed the motion or in the period between noticing the motion or the actual date it was heard.

Q. What about before that time period? Is there a potential you had a conversation you can't recall the details?

MR. KELLEY: I object to that as calling for speculation.

BY MR. STEPANIAN: Q. Fine. Did you have a conversation with him prior to the filing of this motion?

[179] A. I don't recall for sure. Probably.

Q. All right, now, did you know that there was a civil document filed with the Court on or around the seventh day of February, 1980 concerning a money judgment and a writ of execution?

A. May I see the document?

Q. Sure.

MR. STEPANIAN: May I approach the witness, your Honor?

THE COURT: Yes.

THE WITNESS: I don't know. There was a, I think there was one originally. I knew of the civil writ. There was one originally that had expired and I believe this was the second one. I don't believe I knew specifically when the second one was filed.

BY MR. STEPANIAN: Q. You were having conversations with an attorney, with an attorney for the man named Collins?

A. Yes, although my conversation with him happened previously.

Q. Have you had a conversation with a man named Collins who was a neighbor involved in a suit?

A. Yes.

Q. It was a fact, is it not, they were in a very heated neighborhood dispute?

MR. KELLEY: Objection, calls for hearsay.

[180] MR. STEPANIAN: Strike that.

BY MR. STEPANIAN: Q. They were in fact complaints by Collins about Merchant, and they share the road, which is adjacent to their property; is that correct?

A. There were certainly at one time between them. I never was quite clear on what exactly the easement problem was, but I was aware it had something to do with an easement problem.

Q. A neighborhood fight between these people?

A. They disagreed about a number of things.

Q. Fine. In fact, you were in communication with Collins. You were in a communication with his lawyer and you knew of this conflict they were having between them, this conflict, correct, prior to this, prior to filing this motion?

A. The communication I had—

Q. Just answer the question, please, You knew they were conflicting, you knew they were neighbors, you had conversations with Collins and you knew there was a writ.

MR. KELLEY: Objection to the question as being argumentative. He is making various points that may not have any relevance to her conversation.

MR. STEPANIAN: I am only asking whether or not you spoke to them.

MR. KELLEY: He can ask whether she had a conversation with the lawyer of Collins prior to the filing.

[181] BY MR. STEPANIAN: Q. You knew there was a writ filed, correct?

A. Yes.

Q. Prior to filing this motion?

A. Yes.

Q. You knew that you spoke to Collins?

A. On any subject? Yes.

Q. You knew that you talked to Collins' lawyer.

A. Back in the fall? Yes.

Q. You knew there was a heated dispute between these people?

A. I don't know if I'd call it heated. I knew it was longstanding and covered a variety of subjects.

Q. It was a feud, basically?

MR. KELLEY: Objection.

THE COURT: Sustained.

MR. STEPANIAN: What would you call it?

MR. KELLEY: Objection, totally irrelevant.

THE COURT: Sustained.

BY MR. STEPANIAN: Q. How long have you been out of law school?

A. I graduated May of 1979.

Q. How long have you been a lawyer?

A. Since November, '79.

Q. Did you work immediately for the D.A.'s Office?

A. Within a few months.

Q. This is your first job as a lawyer; is that correct?

[182] A. No, I worked for a number of attorneys in San Jose.

Q. How many did you work for?

A. I did free-lance criminal law for at one point up to sixteen attorneys.

Q. And then you got this job?

A. Uh-huh.

Q. Okay, now, you have been up to that property before, hadn't you?

A. Yes.

Q. And who did you go up there with?

A. On which occasion?

Q. How many times have you been up there?

MR. KELLEY: Objection to the relevancy. If he wants to give a time period—

MR. STEPANIAN: First, I want to find out—

THE COURT: Overruled.

BY MR. STEPANIAN: Q. How may times were you up there?

A. On the Merchant property on on [*sic*] the private road?

Q. On that private road.

A. Probably six to ten times, maybe.

Q. Okay, and what purpose were you up there for—strike that—I will ask you specifically, did you go up there looking for drugs?

A. I didn't go up there looking for drugs.

Q. Were you told they were growing marijuana up there?

[183] A. I believe the narcotics people were, but yes, I think the information had originally come through a phone conversation they had with Otis Pogue who relayed it to Sheriff's Narcotics.

Q. Did you find marijuana?

A. I didn't look.

Q. You didn't look? Okay, did you go up there and talk to Mr. Collins?

A. I don't believe I ever talked to Mr. Collins in person.

Q. On the telephone?

A. Yes.

Q. Did you go up there while you were investigating this lawsuit?

THE COURT: Which lawsuit?

MR. STEPANIAN: Criminal Case 417, 417(b).

THE WITNESS: Yes.

BY MR. STEPANIAN: Q. How long did you—how many times did you go up there for the 417, 417(b)?

THE COURT: Would you make an offer of proof.

MR. STEPANIAN: I believe, your Honor, that there was an intention to purposely violate Mr. Merchant's rights by this young District Attorney by knowing that although he did not receive notice that there was a violation, that she concocted this clarification, that she accompanied and was instrumental in the police going up there, and it was her idea, instrumented and instigated by a neighborhood dispute with a man named Collins and [184] went there and unconstitutionally and purposefully violated his rights by concocting and creating a motion which she knew full well at the time that this man did not have a search condition on his property and went up there to violate his constitutional rights and create a fraud on the Court based on the fact she was fully aware of the facts.

THE COURT: All right, what's the relevancy?

MR. KELLEY: Based on the offer of proof, I believe there was a finding by the Court on the 27th, the terms in fact were in effect and there were calls not only to this witness, Otis Pogue, for one, from neighbors other than—

THE COURT: We are getting far afield. I don't understand having to do with investigating 417, what that has to do with this proceeding.

MR. STEPANIAN: Here's the point: She was up there a lot. She has a lot of communications up there.

BY MR. STEPANIAN: Q. Did you ever see Mr. Merchant on these trips when you were up there?

A. I never saw his house until shortly before the search warrant.

Q. Your were on that road?

A. The road I was on runs in front, and from the front the asphalt road, and from that road you could see the barn; but I could never see the house. In order to see the [185] house, you either have to get very far down in the Collins property, all the way out in front of their property, or being on the road that runs in front of Mr. Merchant's house, which I was under the impression was his private road.

Q. Let me ask you, do you know anybody who went up there and took a plant which purported to be a marijuana plant prior to your filing this motion from his property?

A. Not that I know of.

Q. Let me ask you this: You attempted to clarify or modify this stay order because, it's true, is it not, that you were not sure as to whether or not the search and seizure clause was in effect at the time that you were writing or researching this project; is that correct?

A. Yes.

Q. And then when you came in court, you knew that Mr. Merchant was there; is that right? Mr. Merchant was not there?

A. Yes.

Q. Right. Was there a waiver of his presence in court?

A. Not at that time. I believe it had happened on other occasions.

Q. Excuse me. On this particular time I am asking you about that day in court.

A. No.

Q. No? Okay, but you had been in court when—we'll strike [186] that. All right, now, so you, after you received, after you received the order by the Judge, did you have an order written and submitted to the Judge?

A. No.

Q. It was an oral order that you went on?

A. It was an oral clarification.

Q. Excuse me, was it a clarification or a reinstatement?

MR. KELLEY: Objection. It's argumentative and irrelevant. She's not the Judge.

THE COURT: Yes.

BY MR. STEPANIAN: Q. As you recall, did the Judge indicate it was a reinstatement of the probation itself in the record?

THE COURT: It's in the record.

BY MR. STEPANIAN: Q. Strike that. Was your intention upon receiving this order by the judge to then put that order in effect?

A. My intent directly after the motion was to go back to the D.A.'s Office and discuss it with a few more people.

Q. Your intention, was it not, was to go up there to the property and have that be in effect; is that not true? You wanted to search that property pursuant to that, pursuant to that search and seizure clause?

A. If that was going to alleviate the problem.

Q. Excuse me, what's the answer to the question? When you filed that motion, was you intention—

[187] MR. KELLEY: I object to Counsel badgering the witness.

THE COURT: She didn't answer the question.

BY MR. STEPANIAN: Q. Was it your intention when you filed this motion that the order was granted?

MR. KELLEY: Could the Court direct the defendant not to read my notes?

MR. MERCHANT: He has been reading mine.

BY MR. STEPANIAN: Q. Did you intend to go up and search that property pursuant to filing those motions to get that modification or whatever it was? Was it your intention to, when you received the order from the Judge, to go up there and search that property?

A. I don't think I understand the question. When did you want my intent?

Q. Let me ask you this: Was it your intention when you noticed and had the hearing on the 27th of February, prior to that time, was it your intention that after you got that order by the Judge that you were going to attempt to execute that order of search and seizure?

A. At the time we had the motion, I considered that possibility.

Q. Well, was it a possibility or was it in your mind as something you wanted to do?

A. At the time, it was something I wanted to do.

Q. And, thank you, you filed this motion for clarification [188] because you wanted, as clear as you could, to make sure tht you could go up there and do that?

A. Yes, I wanted to know what recourse I had, or we had.

Q. Yes, because prior to that time, after conversations with Danner and/or conversations that you had in your attempt to determine the law, you weren't sure whether that stay, whether that order for a stay, stayed the search and seizure clause; it's what you testified to before, you weren't sure?

MR. KELLEY: Objection. Argumentative. Also, cumulative.

THE COURT: Sustained.

BY MR. STEPANIAN: Q. Okay, that's fine. How long was it before you talked to the police officer after you got the order?

A. I probably talked to at least Otis Pogue that afternoon.

Q. Okay, so the motion was heard, the motion, the motion was heard on the 27th; was it not? Morning or afternoon?

A. I think it was in the morning.

Q. Did you put in your petition for clarification that you intended to go up if there was an order, and search that premises?

A. No.

Q. Did you indicate in your motion that there was complaints or anything like that concerning sounds that you heard?

A. No, I discussed that with Mr. Foster.

[189] Q. Excuse me, I am asking you, did you put it in the papers?

A. No.

Q. Did you then go and you saw—you then went and you saw Mr. Otis Pogue, correct? He is an investigator in Santa Cruz?

A. Well, I saw him, I am sure, when I returned to the office.

Q. And did you have a discussion with him?

A. I am sure I did.

Q. And what did you say to him?

A. "Otie, the motion was granted."

Q. Good.

A. And, "I want a search—when can you get together to search?"

MR. KELLEY: Objection.

BY MR. STEPANIAN: Q. Put it this way: What did you ask him to do?

A. I probably said, what do we do now.

Q. Did he then say that he was going to attempt—that's a hearsay statement, I won't get into it now. Then, when was the next time that you had a conversation with any police officer concerning going up there and searching?

A. Probably Tuesday morning or late Monday afternoon.

Q. Isn't it a fact that you told Otis Pogue at the time that we got the order that we should go up there and search it based on the complaints and statements you were [190] hearing on the phone? Didn't you say, "Now we can go up and now we can search because I have an order"? Something such as that? Didn't you say that? You said, "You can do that now."

MR. KELLEY: Objection. Assumes facts not in evidence.

THE COURT: Overruled.

THE WITNESS: I don't recall making that statement.

BY MR. STEPANIAN: Q. Do you recall wanting to do that and trying to find a way, the earliest time you could go up and search?

A. No.

Q. Go on. There was a manpower problem at that time, correct?

A. No, because if I wanted the earliest time, I could have gone up Friday afternoon.

Q. Wouldn't that have given time—

A. I would have wanted to give time to Mr. Foster to talk to his client.

Q. You didn't know whether or not he talked to his client?

A. I assume he talked to his client prior to the motion.

Q. You assume that because lawyers usually tell clients when there are hearings?

A. No, because I couldn't imagine an attorney who would voluntarily put his client in that position and not tell him.

[191] Q. The question is, you did not know whether he told him or not.

A. I don't know, no.

Q. Fine. And afterwards, well, you ended up on Tuesday having a conversation with law enforcement concerning the, concerning going up there and searching that residence; is that correct?

A. Yes.

Q. Okay , and did you make arrangements for you go to up there?

A. Yes.

Q. You wanted to go up there, correct?

A. Yes.

Q. Okay, and you were just determining when this could happen after conversations with Pogue; is that right? In other words, you wanted to know when it was going to happen?

A. Well, as of Friday, I didn't think there had been any determination made as to when or if it was going to be, to be happening.

Q. You wanted to go if it were going to happen?

A. Yes.

Q. It's fair to say it was going to happen very quickly, correct? When people could get organized?

MR. KELLEY: I object. That's calling for speculation.

[192] THE COURT: I will sustain it.

BY MR. STEPANIAN: Q. You were waiting for a call when—did you leave it with Pogue that he was to call or you were to call him as to when this search condition was going to be executed?

A. Neither. I don't remember it being left that certain. That Friday we left it at "we'll see what happens." Since I see him every day, it wasn't a question of setting up right then.

Q. When was the first time that you saw him? When was it that you saw him when arrangements were being made to go up there?

A. As I said, probably late Monday or Tuesday morning, because the murder had happened.

Q. Right.

A. And he was tied up in that, so I don't remember, I don't believe that we would have discussed this. I think we would have discussed probably late Monday or early Tuesday.

Q. So Friday you had a discussion with him concerning the fact that you had the orders?

A. Uh-huh (indicating yes).

Q. Monday you had a discussion that the murder had happened. In the process he mentioned to you he was getting things organized for the search; is that correct? Monday or Tuesday, you said?

[193] A. I don't know that he said he was getting things organized. He indicated that he was going to be tied up in the murder and that I should go, and I think he had already talked to Lieutenant Kirkland or Sergeant Shipp, and I should probably go up and speak to them. And I think I did go up and talk to Shipp.

Q. Did you say you wanted to go along on the ride?

MR. KELLEY: Objection to the terminology.

BY MR. STEPANIAN: Q. Okay. This search, did you make arrangements with Kirkland to go up on the search?

A. Yes.

Q. And when did you do that?

A. Probably late Monday or early Tuesday.

Q. Did you meet them at the firehouse before they went up to the house?

A. No.

Q. Where did you meet them?

A. At the County building.

Q. Then you went to the firehouse with them?

A. Yes.

Q. You all went up to the house?

A. Yes.

Q. You saw the officers at the door in the rear, near the swimming pool?

A. Yes.

Q. And did you see Cleo come to the door?

[194] A. I remember David being at the door. I don't remember Cleo being the first person. I remember her being at the door, but I remember both being there. Excuse me, I do recall, because they had to call him from back somewhere else and he came to the door in a bathrobe.

Q. And did you see a person with a shotgun? One of the police officers?

A. I don't remember specifically, but I am sure they probably had them.

Q. Did Mr. Tanner have a shotgun?

A. I don't recall. I don't remember.

Q. Did you—who was the first person you saw enter the residence?

A. I think it was Lieutenant Kirkland. I wasn't specifically at the door.

Q. Well, how many went into the residence at one time? Did one go into that residence?

A. I think only one person went into the residence.

Q. And other people waited outside?

A. Yes.

Q. And that person had a shotgun; isn't that true, if you can recall?

A. I don't recall whether they had a shotgun or not, but, you're right, it was Bob Tanner, I think. Because I think he—

Q. Go on.

[195] A. I am just trying to remember. You're right, it was Bob Tanner, but I believe he had a shotgun, but I don't know if he had or not.

Q. Tanner was inside, other people were inside, other people were outside, ended up in the house with Mr. Merchant at some point. Were you specifically referred to while you were outside, by Mr. Merchant?

A. Yeah, that was after quite a lot of conversation, because I was up above and then I came down to the door.

Q. And the officers were outside the door and one officer was inside?

A. And somebody, I believe Kirkland, said, "Do you know who that is?" or something like that.

Q. Fine, and you then went inside, correct?

A. I went inside. The door opened and I went inside with the rest of the officers, yes.

Q. There was an officer inside, Tanner, and then you and the rest of the officers went inside; that was in the kitchen area, correct?

A. I would say they went in and I followed.

Q. All of the officers and yourself were inside that kitchen area?

A. Not all of the officers, but the officers at the door.

Q. That's what I mean, the officers at the door.

A. Yes.

Q. And you at that point had a conversation; is that [196] correct? On the telephone?

A. Yeah, because I think that—yeah, David was already on the phone.

Q. That's right.

A. With Mr. Foster, and at some point within the first couple minutes, I started talking to him.

Q. Good. And you had a conversation with Mr. Foster on the phone; is that right?

A. Yes.

Q. And it's a fact, is it not, did you tell Mr. Foster the purpose of why you were there?

A. Yes.

Q. And did Mr. Foster tell you that Mr. Merchant did not have any notice of this search, search condition that was reinstated or was the subject of a hearing that you were at with Mr. Foster on the 27th?

A. Yes.

Q. And did he tell you that Mr. Merchant did not have any notice of it and he didn't feel he was subject to the search condition?

A. No, I don't recall discussing the legal aspects of it. I remember Mr. Foster saying he didn't have notice, and I answered, I said, well—

Q. Well, what?

A. I believe I said in a misdemeanor matter, an attorney's actions are binding on his client. The client doesn't [197] need to be present.

Q. No, in other words, the legalities you said to him, he didn't have to be present in response to Mr. Foster saying to you, my client didn't have any notice.

A. Then we had a discussion about his statement that he was going to notice him.

Q. Well, he was going to notice him, but you were all in the house there and there was a discussion concerning the search and the search condition between you and Foster, correct?

A. He said that David didn't have any notice. I said, I don't know if he had any notice or not, but it was my understanding that an attorney can appear for his client. And then I believe I said something to the effect of hadn't you spoken to him or didn't you tell him, or something like that. And the discussion went from there to a discussion of how or why he did or did not.

Q. Okay, and isn't it a fact that Merchant was saying at this time in an agitated way that he didn't have notice and wasn't subject to the search condition?

A. I don't know if it was the same time, but a little bit after that.

MR. KELLEY: I would object if this is offered for the truth of the statement, did he in fact, did not have notice.

THE COURT: As to the conversation?

[198] MR. STEPANIAN: Prior to that time he didn't have notice.

THE COURT: Wait a minute. Who said that—

MR. STEPANIAN: Merchant.

MR. KELLEY: I object if it's going to the truth of the statement. If it's coming in to the fact he made the statement.

MR. STEPANIAN: He has testified to what he said.

MR. KELLEY: Fine.

THE COURT: Okay.

BY MR. STEPANIAN: Q. And then you're saying that Foster had a conversation with you, just related, as to him saying he didn't notify him; is that correct? Please answer so that it can be audible.

A. Yes.

Q. Did you mention at that point, well, we can go on the civil writ?

A. Not at the—what I said to Sam was that we are still going to do the probation search, and in addition to that, we had the writ of execution.

Q. You said that notwithstanding those statements by Sam Foster and notwithstanding those statements by Merchant that you were still going to proceed with the probation search?

A. Yes.

Q. Okay, now, at that point, did you then have a [199] conversation with—strike that—Sam Foster stated he was going to talk to Judge Marlo or something of nature; is that correct?

A. No. I don't recall him ever indicating he was going to call Judge Marlo. When my office called me and told me Judge Marlo had called, I was very surprised.

Q. Did you call Judge Marlo?

A. Yes.

Q. Did you have a conversation with Judge Marlo?

A. Briefly.

Q. Did you tell Judge Marlo you had a conversation with Sam Foster?

A. Yes, I think I did.

Q. Did you tell Judge Marlo that David Merchant did not have notice of his probation search?

A. I don't recall if I mentioned it or not. We didn't specifically discuss much of anything.

Q. Did you have a discussion with Judge Marlo concerning the probation search?

A. No, other than the, other than the fact we were there beginning to start one.

Q. Did you tell Judge Marlo the fact that Sam Foster did not give notice to, did not give notice to Mr. Merchant and that Mr. Merchant said that he did not have notice that he was subject to search and seizure? Did you tell that to Judge Marlo?

[200] A. I don't recall, I don't recall. It didn't seem to me we discussed it in depth.

Q. What was the discussion?

A. I called Judge Marlo, Judge Marlo said something to the effect, I just had a very hysterical phone call from Mr. Foster about something that you were doing, and what were you doing.

Q. What did you tell him?

A. I said, well, we are doing a probation search on David Merchant.

Q. Yes?

A. And he goes, "Oh," and I don't think there was much else to the conversation with the exception of Judge Marlo said on more than one occasion, he said, well, don't, don't take this conversation to mean that I have any

opinion as to whether you should or shouldn't be doing what you are doing. And I thought because Sam was so upset I should return the call.

Q. Did you mention whether or not the man had noticed to Judge Marlo whether or not he was subject to search and seizure?

A. I don't recall. I may have.

Q. You may have?

A. I don't recall discussing specifically the probation search, other than saying, "Well, don't—"

Q. Could it have been possible—strike that.

[201] MR. KELLEY: I object.

MR. STEPANIAN: Sorry.

BY MR. STEPANIAN: Q. Do you have any recollection one way or the other of discussing notice? You had discussed notice about, what, three minutes ago, ten minutes before with Sam Foster, correct?

A. But I wasn't discussing the merits of the case.

Q. I am not asking about the merits. I am talking about notice.

A. That's what I consider to be a legal merit. I don't recall discussing that. I could have.

Q. And it's a fact, is it not, that Judge Marlo said to you that Sam Foster said he, Merchant, had no notice?

A. He may have.

Q. Well, was there anything discussed about what to do when the defendant, Merchant, had no notice? Do you recall?

A. No, there wasn't because there was the whole conversation, the major portion of the conversation was my impression that Judge Marlo didn't want to hear any of the facts of the case. He was simply returning a phone call because Mr. Foster was so upset in whatever phone conversation he had with him.

Q. But the Judge said he had had a conversation with Sam Foster?

A. Yes.

Q. Okay, fine. All right, now, was there any discussion [202] with Kirkland, Kirkland—sorry, stike [*sic*] that—at that point after the conversation with Judge Marlo, was the search in progress or was the search, had the search begun yet?

A. At the time of the conversation with Judge Marlo?

Q. Right.

A. If I remember correctly, it was just when Mr. Merchant was going, taking the officers up to the two rooms upstairs, so it was just started.

Q. In other words, at least at the point where Judge Marlo, it sort of had just started when you had the discussion with Judge Marlo? This was after the conversation with Merchant and Sam Foster but before the termination of the conversation with Judge Marlo, correct?

A. Yes. It was under way because I recall more specifically when it ended in relationship to the search.

Q. Now, various guns were seized throughout this search, correct?

A. Uh-huh (indicating yes).

Q. And these guns were seized and they were being brought down to the kitchen area, correct?

A. Yes.

Q. Where were you at the time this was happening?

A. I was originally, I was originally in the living room, and then when I was talking to Judge Marlo, I was for most of the conversation, I was behind the door in a, [203] like a utility room. You can look through the door. There was a window, and the door was shut, but you could look through the window.

Q. Right. But, you didn't contact the Probation Office prior to going up there?

A. No, he didn't have an assigned probation officer.

Q. So he didn't have an assigned probation officer and there was no communication with the Probation Office on the way up there; is that correct?

MR. KELLEY: Is that to her personal knowledge?

BY MR. STEPANIAN: Q. To your personal knowledge, was a probation officer contacted or was there any mention of a probation officer?

A. I believe at some point somebody asked if he had a probation officer, and I said I didn't think he had been assigned one.

Q. There wasn't even one assigned?

A. As far aş I know, he wasn't assigned one.

Q. Do you recall during this proceeding that there was a suitcase that was being inspected, not opened, by Lieutenant Kirkwood, Kirkland?

MR. KELLEY: Personal observation?

BY MR. STEPANIAN: Q. Did you happen to notice that the lieutenant was looking at a suitcase?

A. Later.

Q. Put it this way; Did you see the suitcase open or did [204] you see the suitcase closed?

A. Both.

Q. Did you see the officer open it up?

A. Lieutenant Kirkland?

Q. Yes.

A. More than once.

Q. Pardon me?

A. More than once, yes.

Q. You saw him open it up?

A. Correct.

Q. A suitcase more than once, yes?

A. Yes.

Q. And this suitcase contained some drugs, correct?

A. Correct.

Q. Prior to opening it up, did anybody say to you, did anybody suggest to you whether or not the officer needed a suitcase—strike that—a search warrant to open up this suitcase? Anybody ever suggest that to you?

A. Lieutenant Kirkland, as far as I knew, wasn't the first officer.

Q. Did any officer suggest to you to have a search warrant to look into the suitcase?

A. Prior to opening that suitcase?

Q. Yes.

A. No.

Q. Okay. Approximately how long was it from the moment that you entered the door to the seeing of Kirkland with the suitcase?

[205] A. Not very long at all. Well, strike that, because I don't think they brought it down right away.

Q. Okay, fine, That's good. That's good. Cleo had left at least by this time?

A. Prior to my seeing Lieutenant Kirkland open the suitcase?

Q. She left?

A. Yes, and I said fine, as far as I'm concerned.

Q. But she left on her own free will?

A. She waited until I asked Sergeant Shipp.

Q. Okay, fine. And she left after that; is that correct?

A. She walked outside and went over to one of the cars, and they found the suitcase and had her come back.

Q. Fine, okay. So, how long would you say that was, getting back to the original question, from the point of Tanner's original entry to the point in which the suitcase was opened by Officer Kirkland?

A. I don't—

Q. An hour? Two hours?

A. No, I am going, fifteen, twenty minutes, maybe.

Q. How much?

A. Twenty minutes, maybe. I don't know.

Q. You don't know; is that right?

A. Well, the suitcase, the end of any phone conversations with Judge Marlo coincided very closely with the time the suitcase was found and first opened by the officers upstairs.

[206] Q. Excuse me, hold it. I will ask that be stricken.

You couldn't see through the wall to see an officer open up the suitcase upstairs, correct?

A. No, but he yelled down–

MR. STEPANIAN: Strike that. That's hearsay.

THE COURT: Stricken.

BY MR. STEPANIAN: Q. I am only talking about Officer Kirkland.

A. Okay.

Q. You saw him open it up?

A. Yes.

Q. Fine, okay. How many weapons would you estimate were found in the area that Mr. Kirkland was at the time he opened the suitcase?

A. Lots.

Q. Lots? Thirty, forty guns basically?

A. I don't know.

Q. You don't know?

A. More than that.

Q. More than that? How many about?

A. I don't think they brought the suitcase down until the majority of the guns were found.

Q. Fine, okay. I am just sort of groping around, Judge, so we can close this out.

MR. KELLEY: Stipulate to that.

BY MR. STEPANIAN: Q. You were in a sort of an area where there was some files or something when you [207] were talking to Judge Marlo, right? There was a file cabinet or something?

A. One side of it.

Q. You were sort of looking at the files when you were talking?

A. No.

Q. You opened the file cabinet, didn't you?

A. After we had the search warrant.

Q. After you had the search warrant? That's the only time you opened the file cabinet?

A. That's the only time I recall being aware of the fact the cabinet was there.

Q. You talk to Judge Marlo in the room where there was a file cabinet?

A. Yes, there is a closet and a bathroom off the kitchen area.

Q. But you knew that the file cabinet was there before you got the search warrant?

A. I was standing in the entry way looking out the window watching what was going on in the room.

Q. Let me get it clear. You knew that there was a file there prior to getting the search warrant?

MR. KELLEY: Strike that. File, or file cabinet?

BY MR. STEPANIAN: Q. File cabinet.

A. I suppose I did.

MR. KELLEY: Objection, relevancy.

[208] THE COURT: I will sustain the objection.

BY MR. STEPANIAN: Q. How many phone calls did you make from that residence?

MR. KELLEY: At what time?

BY MR. STEPANIAN: Q. During the course of the time prior to the search warrant.

A. Maybe four of five, something like that.

Q. Four or five? Who did you call? Judge Marlo?

A. Judge Marlo. I called my office—

Q. Um-hum.

A. And then the phone conversation to get the telephonic warrant.

Q. Let me ask you a question: Did you tell Judge Marlo that you had received these telephone calls from neighbors prior to seeking to modify or clarify this probation? Did you tell Judge Marlo?

A. The sentencing, I did.

Q. No, no, no, no, no.

A. You mean in between the arguing and the—I may have. Yeah, I think I made a comment that we were still having the same problem.

Q. Did you tell Judge Marlo specifically about that, say, from the moment that you asked your researcher to work on that and the hearing thing?

MR. KELLEY: Is Counsel referring to ex parte communications?

[209] MR. STEPANIAN: I am talking about straight ex parte communications.

THE WITNESS: I don't recall having conversations about specific phone conversations. I recall making a comment, I told him I was filing the motion, something to the effect that, yeah, we're still having the same problem.

BY MR. STEPANIAN: Q. Was Sam Foster there when you said that to him?

A. No.

Q. How about from the point of time when you came and you didn't give sufficient notice to Sam Foster, and February 27th—did you tell the Judge anything like that?

A. No, I was too embarrassed.

THE COURT: Will you read that question and answer back?

(Whereupon, the reporter read the last question and answer.)

BY MR. STEPANIAN: Q. You did not ask Judge Marlo or call back Judge Marlo about a search warrant for purposes of searching the premises after the suitcase was opened, did you?

A. No.

Q. You went to a different judge?

A. Yes.

[210] Q. And who was that judge that you went to?

A. Judge Kessell.

Q. Did Judge Kessell ask you whether or not, who was the judge who assigned the search warrant—sorry, the search and seizure condition?

A. I don't know if he asked me or if it was the attorney who was doing the telephonic.

Q. Excuse me, did he ask you?

A. I don't remember having a direct conversation with Judge Kessell.

Q. Okay. Did you have any information from any informant concerning whether or not there were narcotics on that premises prior to going up there on the third of March?

A. No.

Q. How about from other police officers?

A. No.

Q. Private citizens including citizen informants?

A. I had no information about narcotics.

Q. That's marijuana and drugs, too?

A. Had no information.

Q. Same answer?

A. Same answer.

Q. Okay. Mr. Shipp, he's head of narcotics; is he not?

A. Sergeant Shipp is head of Narcotics in Santa Cruz County right now.

Q. In the Sheriff's Office, correct?

A. Yes.

[211] Q. On the third of March?

A. Yes. Yes, he was just transferred in, yes.

Q. He was head of Narcotics on the particular, on March 3rd?

A. Yeah, I think that was about the time he transferred in.

Q. Did Collins say to you, did Mr. Collins call you and ask you, tell you that there was marijuana plants growing on the property of Mr. Merchant?

A. No, he didn't tell me.

Q. Did he expect—was that ever mentioned with Mr. Collins?

A. I don't believe the conversation was with me.

MR. STEPANIAN: I have no further questions.

THE COURT: Any redirect?

MR. KELLEY: Yes.

**REDIRECT EXAMINATION**

BY MR. KELLY: Q. Tell us your reason for focusing on the Merchant's residence in February of this year.

A. Counsel, I had been having continual complaints coming to either me or through—

MR. STEPANIAN: I'll object to other people.

MR. KELLEY: No way. Hold it. You heard his offer of proof about the bad faith of the D.A.'s Office, why they are focusing on Merchant and trying to use the search clause for other purposes, perhaps marijuana plants, narcotics. It's extremely relevant that the reasons she sought to go up there—this record is going [212] to be reviewed, I am sure; and it's very important that the bad faith be rebutted.

MR. STEPANIAN: Excuse me, your Honor. After I said that to you, you did not then ask any questions after that, so I stopped my questioning at that point.

THE COURT: There has already been testimony. She said she did in fact have complaints and then you objected.

MR. KELLEY: I am not going to belabor it, but I think it needs to be clarified.

THE COURT: I will sustain the objection. I'm not going to allow it.

BY MR. KELLY: Q. Were there any reasons other than neighbor complaints that you sought the clarification; neighborhood complaints about guns being fired?

MR. STEPANIAN: Objection.

THE COURT: I will overrule that objection.

THE WITNESS: No.

BY MR. KELLY: Q. Was it solely Mr. Collins' complaints which caused you to seek the clarification?

A. No.

MR. STEPANIAN: Asked and answered.

THE COURT: I will allow it. Is that your last question?

MR. KELLEY: In that area.

BY MR. KELLY: Q. Were those complaints from the [213] neighbors that you and Pogue received the only reason you wanted to ensure there was an active search clause?

MR. STEPANIAN: I am going to object to this.

THE COURT: I will sustain it. I think she has amply testified. There was ample testimony in this regard. I will sustain the objection.

BY MR. KELLY: Q. When did you first start getting these complaints from the neighbors about the shootings, the firearms?

MR. STEPANIAN: Excuse me, there was no complaint about firearms. That was not testified to.

MR. KELLEY: Then if there isn't, that should be on the record.

MR. STEPANIAN: Look, we have gone into that, your Honor. I don't remember gun, firearms.

MR. KELLEY: Shootings being fired from the area of the Merchant residence.

BY MR. KELLY: Q. When did you start getting complaints?

MR. STEPANIAN: Excuse me.

THE COURT: Why are we getting into this?

MR. KELLEY: Because this is exactly why Counsel is trying to go into it, saying this is a boot strapping situation; we are trying to go in on a drug thing.

THE COURT: I think you're trying to rehabilitate something never established in the first place.

[214] MR. KELLEY: I am laying a foundation for what she does next.

BY MR. KELLY: Q. Did you get those phone calls after the sentencing in this case?

A. I got them prior to the trial.

Q. Did you or Pogue get such calls after sentencing?

A. Yes.

Q. Did you communicate those neighbors' concerns to Mr. Foster?

A. Yes, I mentioned it to him.

Q. Could you tell us those times or time?

A. I recall prior to arguing, us arguing the motion, it was in court and the judge was not on the bench at the time, my making a statement. He was asking me about, you know—

MR. STEPANIAN: Excuse me, this is hearsay.

MR. KELLEY: Counsel has gone into the same grounds about conversations between attorneys. I am entitled on rebuttal to explore those conversations. The record should reflect Foster saying such and such to this witness and her responding. And in fairness, I think we should flush out the whole picture and not let him pick and choose.

MR. STEPANIAN: Let's go. We have been doing very well so far. All I say is that: The conversations that I had were communications that we had at the time of the [215] arrest. I feel that we're going to continue to ask leading questions. Of these questions, all of which are hearsay, I think are not relevant to these proceedings. They had plenty of opportunity to do this at the time the motion to dismiss was had.

THE COURT: I am going to allow the question at this time. Overruled.

BY MR. KELLY: Q. It is the conversation you had with Counsel.

A. Mr. Foster made some query to me as to—

MR. STEPANIAN: This is again hearsay.

THE WITNESS: —as to what the point of the motion, why was I bringing the motion. And I turned and said to him something to the effect of, Sam, you knew

what the problem was. We are still having the problem with the neighbors, the guns are still going off, he doesn't belong with guns. And he commented—

MR. STEPANIAN: I'll object, your Honor.

THE COURT: I will sustain that part.

BY MR. KELLY: Okay, fine, thank you. Did you expect Mr. Foster to have made communication about the existence of a search probation at the time you did your search on Tuesday?

MR. STEPANIAN: That was asked and answered.

THE COURT: Rephrase it.

THE WITNESS: Absolutely.

[216] BY MR. KELLY: Q. Is this the first case you have ever gone into the field on that you have handled?

A. No.

Q. Is it a frequent practice or not?

A. I'd say it's frequent.

Q. Have you gone on executions of warrant that you have written in the past?

A. Yes.

Q. Do you have any vendetta against this defendant?

MR. STEPANIAN: Objection.

THE COURT: I will allow it.

THE WITNESS: No.

BY MR. KELLY: Q. What were you too embarrassed to tell Judge Marlo? I was a little unsure.

A. I was just embarrassed because I had forgotten the ten-day requirement. I was really embarrassed.

Q. Did you or Hopkins handle the telephonic?

A. I talked to [him] about it and [he] set it up, called us back, and I was on the phone listening until Kirkland got on the phone.

Q. Do you have any specific recollection as to when the suitcase was found in all these proceedings? What time of the search?

A. When it was found?

Q. Well, when you first saw it.

A. Yes, but that was much later.

[217] Q. Okay, now, lastly, you had a conversation with Sam Foster on the phone from the house, the Merchant house?

A. Yes.

Q. Now, what did you tell him?

A. Did I tell him?

Q. Did you tell him your purpose for being there?

A. Yes.

Q. And did—what did he indicate about any notice that he may or may not have given to his client?

A. Something to the effect of, well, I didn't have a chance to talk to David yet, and he called a secretary in the background—I think her name is Angie or Andrea or something like that—and said something to the effect that the letter was on his desk.

MR. STEPANIAN: Objection, your Honor. That's been gone into.

THE COURT: Yes, it has.

BY MR. KELLY: Q. Did Sam Foster tell you to go ahead and do the search but limit it to guns?

MR. STEPANIAN: I will object to that. That was a leading question.

THE COURT: All right.

BY MR. KELLY: Q. What did Sam tell you about the search after you explained your purpose for being there?

A. After we discussed the notice and I indicated that we were going to be continuing with the search, he indicated [218] he would tell David to let us search for the guns.

Q. What did he indicate about notice being received? You started to answer that question.

A. He called to somebody in the back room and a woman that I assume was his secretary, and then he got back on the phone and said yeah, yes the letter is still on my desk and is going out today or was going out today, or something to that effect.

Q. Okay, now, you saw the guns that were found, or a lot of them; you testified to that?

A. Yes.

Q. Saw the suitcase Kirkland was fooling around with?

A. Yes.

Q. Could any of those guns fit inside that suitcase?

A. Probably, at least a third of them.

MR. KELLEY: Thank you. That's all.

**RECROSS-EXAMINATION**

BY MR. STEPANIAN: Q. You mentioned something about a civil writ to Sam Foster during your conversation, did you not?

A. Yes.

Q. Okay, and you discussed the fact that this civil writ, or whatever it was, was for purposes of guns; is that correct?

A. Yes.

Q. Okay, and that was during your conversation on the [219] telephone which Mr. Kelley alluded to?

A. Yes.

Q. All right, he indicated—well, I don't want to get into the notice factor again. I have no further questions.

THE COURT: You may step down.

MR. KELLEY: People rest.

MR. STEPANIAN: Could we take five minutes?

THE COURT: We'll go on.

MS. LEAVITT: He needs to take a personal recess, your Honor.

THE COURT: All right, we'll take a five-minute recess.

(Whereupon, a brief recess was taken.)

THE COURT: People rested?

MR. STEPANIAN: I am just going to ask Officer Shipp a couple questions, your Honor.

THE COURT: Officer Shipp, will you come forward?

* * * * *

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CRUZ
DEPT. A

NO. CR 15,714

THE PEOPLE OF THE STATE OF CALIFORNIA,

*v.*

DAVID WILLIAM MERCHANT, DEFENDANT.

**SUPPLEMENTAL REPORT AND PETITION**

**April 30, 1981**

**CASE SUMMARY**

On November 14, 1980 the defendant was placed on three years formal probation for violating Sections 417 and 417b of the Penal Code. In addition to the standard conditions of probation the following conditions were imposed:

1. Obey all laws.
2. Serve 18 months in the County Jail with 12 months suspended.
3. Participate in an educational, vocational or therapeutic program as directed by the probation officer.
4. Not possess any firearms during the period of probation.
5. Submit person, vehicle, place of residence to search and seizure at any time of day or night, with or without benefit of warrants as directed by probation officer or any peace officer.

Following imposition of sentence the defendant exercised his right to appeal the judgment of the case. Probation supervision was not provided pending the appeal outcome.

On February 27, 1981 the Court granted a motion for clarification. Pursuant to the Court's ruling the original terms of probation were reinstated and given force with the matter of confinement stayed pending outcome of appeal.

On March 3, 1981 officers of various Santa Cruz County and Federal law enforcement agencies conducted a search of the defendant's residence at 25977 Highland Drive, Santa Cruz, pursuant to the search and seizure clause of the Probation Order. During the search a major cache of weapons, controlled substances, and ether was found and seized. The defendant and his co-resident, Cleo Marohn, were arrested on a variety of felony charges. Please see the attached crime reports regarding the residential search.

It is not alleged that, by virtue of the items seized during the residential search in question, the defendant was in possession of items prohibited to him by the terms and conditions of this probation. This matter is being brought to the Court's and defendant's attention for the purpose of providing formal written notice that this matter has been calendared on April 30, 1981 for arraignment on the alleged violation of probation.

**EVALUATION**

If the allegations of probation violation are found to be true by the Court, it is apparent that a major probation violation has occurred. Given the nature of the original crime, the defendant's prior criminal record, and the magnitude of the probation violation, it will be recommended that probation be revoked and the maximum sentence imposed.

**RECOMMENDATION**

It is respectfully recommended in the matter of David William Merchant, Court No. CR 15,714 that if the allegation of probation violation is found true that probation be revoked and the maximum sentence be imposed.

Respectfully submitted,

JAMES W. SOLOMON
*Chief Probation Officer*

By: /s/ALEX MCTAVISH
Alex McTavish
*Deputy Probation Officer III*

Dated: April 21, 1981
Dictated: April 20, 1981

Approved for filing:

[signature illegible]
*Supervising Probation Officer*

The foregoing report has been read and considered by the Court.

Judge of the Municipal Court

Dated: April 30, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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CR. NO. 81-0109-SW(SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

WILLIAM DAVIDSON MERCHANT AND CLEO L. MAROHN,
DEFENDANTS.

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**DECLARATION OF WILLIAM DAVIDSON MERCHANT III IN SUPPORT OF MOTION TO SUPPRESS**

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WILLIAM DAVIDSON MERCHANT declares:

That I am a defendant in the above-entitled action;

That on March 3, 1981, I resided at the premises known as 25977 Highland Way, Los Gatos, California;

That on March 3, 1981, I had possession of an access card to storage area No. 59 of AAA Mini Storage, and by virtue of said access card I had use of and control over said storage area;

That at the time of the searches of the property known as Old San Jose Road (March 5, 1981 and March 13, 1981), I was doing construction on that property and the property was under my control;

That on November 14, 1980, I was present at a sentencing hearing in a misdemeanor action against me; that I was sentenced by the Honorable John A. Marlo, Judge of the Municipal Court of the County of Santa Cruz, and heard him state that the sentence was stayed pending appeal; that I strongly believed that the verdict was erroneous and would be overturned on appeal; that I did not want to sign the form entitled "Conditions of Probation" but was told by my attorney that I must sign the form in order to get the

stay pending appeal; that due to my belief that probation was stayed pending appeal and due to my attorney's statement, I reluctantly signed the form entitled "Conditions of Probation;"

That after the granting of the stay, I had a telephone conversation with Judge Marlo, who had stayed the sentence; that I told him that I knew I didn't have to comply with the terms of the order since I was not on probation at that time but that I felt that I had a moral obligation to dispose of the weapons; that he responded by saying something to the effect that my feeling was commendable and he in no way contradicted my statement that I was not on probation at that time;

That on March 3, 1981 at around 11:00 a.m., when nine law enforcement officers and Deputy District Attorney Patricia Bazar were at my door and Ms. Bazar told me they were there to do a probation search, I told them that I was not on probation nor subject to search and seizure; that at that time I had received no notification that there was a motion to modify or clarify the stay or that an order reinstating probation had been granted; that at that time I believed as I had previously that the stay of the sentence included the probation and all conditions thereof including possession of weapons and search and seizure.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of May, 1981, at San Jose, California.

/s/ WILLIAM DAVIDSON MERCHANT III

William Davidson Merchant III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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CR NO. 81-0109-SW(SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

WILLIAM D. MERCHANT, AND CLEO L. MAROHN,
DEFENDANT(S.)

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**REPORTER'S TRANSCRIPT**

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MAY 21, 1981

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REPORTED BY:
WILLIAM R. JOHNSTON

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[3] *May 21, 1981:*

THE CLERK: CR 81-0109, United States versus William Merchant and Cleo Marohn.

State your appearances, please.

MR. STEPANIAN: Michael Stepanian. I am representing Mr. David Merchant, who is present.

MR. PENROSE: John Penrose for the government.

MS. ROSCOE: Nancy Roscoe for Miss Marohn.

* * *

MS. ROSCOE: I move the admission into evidence of G2-A.

THE COURT: It may be received.

(Whereupon, exhibits G2-A, previously marked for identification, were received into evidence.)

MR. PENROSE: Call Mr. Foster.

SAM FOSTER,

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

**DIRECT EXAMINATION**

*By Mr. Stepanian:*

Q. Mr. Foster, are you a lawyer licensed to practice in the state of California?

A. Yes, I am.

[4] Q. Where are your offices located?

A. Monterey, California.

Q. You are familiar with David Merchant who sits in this courtroom?

A. I am.

Q. Was he your client in a matter that involved a 417 and a 417-B?

A. Yes.

Q. In Watsonville?

A. Yes, that's true.

Q. And this sentencing was in March of 1981?

A. I don't recall the date of the sentencing, but I was present at the sentencing.

Q. You were present along with Mr. Merchant, is that correct?

A. That's correct.

THE COURT: I thought the sentencing was November.

MR. STEPANIAN: Did I say March?

THE WITNESS: You said March.

THE COURT: November of '80 and then the other thing was March of '81.

MR. STEPANIAN: March 3rd.

Q. All right. The trial was approximately October 26th of 1980, is that correct?

[5] A. I don't recall the date. Whatever the records show.

Q. Do you recall there was a sentencing around the fall of 1980.

A. Correct.

Q. After that you received notice from Mrs. Bazar, who was the district attorney in that matter, that there was on a clarification for modification of probation, is that correct?

A. I received notice, that's correct.

Q. Did you communicate in any way this notice for clarification to Mr. Merchant?

A. No, I did not.

Q. After there was some confusion as to the dates in which the motion was filed, is that right?

A. Yes.

My recollection of that is that my secretary did not get it on the calendar. My specific recollection was that a letter came in stating that it had been continued a week. Then I

think the letter of motion may have showed up at or about that time. Then I appeared the second date that the notice—motion was set forth. I think it was a week period of time.

Q. And you came to the court and there was a matter that was before Judge Marlowe, is that correct?

A. Correct.

[6] Q. Was Mr. Merchant present?

A. He was not.

Q. Did he know anything about this motion that was on the calendar?

A. He did not.

Q. And there was a period of time when he received some information about a search taking place, is that correct?

A. That's correct.

Q. Would you describe that to me and what happened? What date was it, do you remember?

A. If you can tell me the date of the search.

Q. Search occurred on March 3rd.

A. It was a Tuesday?

Q. I believe so.

A. I received a call from David indicating that Patty Bazar and some sheriff's officers were at his door and what was going on. I believe at that time I asked him if he had gotten my letter. He stated he had not.

Back up again. I called my secretary in to the office and I asked her to get the file out and asked if we had sent the letter informing David of the hearing and the results of the hearing, because I tried to contact him, I believe, on Friday and was unsuccessful by telephone. She looked in the file and saw a yellow copy of the letter. I told David that I had sent the letter to him and he said he hadn't received it.

[7] MR. STEPANIAN: May I approach the witness?

THE COURT: Was the appeal pending at that time?

THE WITNESS: Yes.

THE COURT: Appeal to the superior appellate division?

THE WITNESS: Right.

MR. STEPANIAN: May I approach the witness?

THE COURT: You may.

MR. STEPANIAN: Q. Would you please look at this letter.

Is that the letter that you referred to in your direct testimony?

A. Well, I hadn't opened it. I thought I had better not. This is my envelope. This has a postmark of March 2nd, 1981. It is addressed to David's address.

Q. This was the only communication you attempted to make to him concerning the reinstatement of his probation?

A. That's correct.

MR. STEPANIAN: May we have that marked?

THE COURT: Yes.

(Whereupon, an envelope with a postmark of March 2, 1981, was marked for identification. D-1.)

MR. STEPANIAN: When did you send this letter on its way?

[8] A. The exact date I can't tell you. I can define the date by the date David was released, because at the time there was a $1 million bail set on David. We had a lengthy hearing in the Superior Court and they got it reduced to $75,000. They only made arrangements to post the bail. He had been released.

I think it was the day he was released or the following day that I stopped by his family home. David was present. They had the letter and they gave it to me.

Q. Will you please open the envelope now. I saved this for Federal Court. We didn't do it in the violation hearing.

If you wish to, Mr. Foster, this is a communication. If you want to assert anything it is all right.

A. This is a letter that I forwarded to David. I noticed on my yellow copy that the date indicated March 3rd. That is a typographical error, because the postmark is the 2nd

and it was mailed on Monday, because my secretary indicated she mailed it.

THE COURT: Keep you voice up.

Anyhow, that purportedly tells about the hearing?

THE WITNESS: The letter indicates, yes, the circumstances of the hearing and that he should be aware of the fact that the probation was in effect.

MR. STEPANIAN: Q. You wrote that letter to give [9] him notice as to the Judge's activity?

A. I dictated the letter on Friday. I have a receptionist who doesn't do the typing. I have a typist that picks up the mail. I assume that's what happened. She picked up my typing on Friday and typed it over the weekend and it was mailed on Monday.

Q. That is the first notice that David received after the 27th—strike that

You gave notice—

MR. PENROSE: Objection. Leading.

MR. STEPANIAN: No questions. Thank you.

THE COURT: He called you over the telephone. Did you read your copy of the letter to him?

THE WITNESS: I didn't recall doing that, Judge.

THE COURT: I thought you said you asked for the file.

THE WITNESS: I was concerned whether or not the letter had been sent out. I recall asking my secretary to give me the file to see if we had a copy of the letter we had sent him. She said there was a yellow copy, which I have given to the lawyer. The yellow copy was there and I said, "David, did you get the letter," and he said no.

THE COURT: Did you tell him the orders include the waiver of search and seizure on the phone as well as the fact you are not allowed to have any guns in your possession?

[10] THE WITNESS: No. The conversation went off in a different tangent. Basically, most of my conversation was with Patty Bazar, Judge Marlowe and some with David.

My main conversation with David was to gather up the weapons. Because you have to understand the context. I was told there was what they call a civil warrant that they had. I didn't know what they meant. I thought what they meant was a writ of execution. What I was trying to tell him to do was take all the guns up and give them the weapons pursuant to that writ.

There was a further conversation with Patty when they were going to do a probation search. I said that is not fair because David had not received notice. That is when I called Judge Marlowe. I don't recall reading the terms of that letter to him.

THE COURT: Now, the hearing on the probation was on February 27th?

MR. STEPANIAN: It was a Friday.

THE WITNESS: It was on a Friday.

THE COURT: You said to him those orders which were entered on Friday after the hearing include the waiver of search and seizure as well as the fact you are not allowed to have any guns in your possession, please make sure that you have no guns at your house, that you are aware of the fact that the residence can be searched. So when you wrote this [11] letter, at least you thought he could be searched.

THE WITNESS: When I wrote that letter, yes, I was relaying the orders of the court that had been made to him.

THE COURT: You had no doubt in your mind that he could be searched and aware of the fact that the residence can be searched?

THE WITNESS: Based upon the orders that were made, that is correct.

**CROSS-EXAMINATION**

*By Mr. Penrose:*

Q. Mr. Foster, approximately how far in advance of the February 27th hearing on the clarification motion was it that you received the motion?

A. Well, it's vague in my mind, but my recollection was that the first hearing didn't get on my calendar. The reason it didn't get on my calendar is that my secretary in filing or something didn't get it on. I think that the first notice I got was a letter from the district attorney's office indicating that the motion had been continued.

Q. I think you testified that you received that letter about the same time you received the motion.

A. Something like that. I don't recall exactly the sequence of events. But then after I got the letter, then it got on my calendar.

Q. I take it it would be a little unusual in your [12] experience to receive a letter concerning a continuance of a matter the same day you received the motion that is the original moving paper?

A. That's correct. As I say, I may have missed the original motion. The letter brought that motion to my attention.

Q. You think what may have happened is the motion came in and you did not make note of it and then the letter came in and the letter caused you to look and find the motion that was already there?

A. That's what I believe happened.

Q. It came in how far in advance of the February 27th hearing?

A. Well, this would be—I'm not sure what the time sequence was. It was a week or two weeks between the two motions. But if it was, it would have been approximately the first of the week of the hearing of the motion.

Q. There is a ten-day notice rule that applies in Santa Cruz County, is there not, on motions of this sort?

A. Depends if it is waived or not. Generally speaking, it is not followed very closely.

Q. When the motion came to your attention via the letter or whatever means, you read it, I trust?

A. Correct.

Q. When you read it, what was your reaction to it [13] concerning its merits, concerning how it was going to affect your client's rights and liabilities?

A. Well, this is the thing that is in my mind. I do a lot of criminal work. It is not a major portion of my practice. As I recall, there was no concern in my mind for some reason. If I try to reconstruct, I would be guessing.

Q. Would it have been that the motion basically was not going to change the status quo, as far as you were concerned, he was already on probation?

A. No, I don't believe that was the reason.

Q. What would be an alternative reason?

A. As I told you in my prior testimony, I would be guessing. I can try to reconstruct it, but I think it would be unfair for me to do that. I just wasn't concerned. It is not my practice to do this.

The reason that I felt the motion was well taken is because I felt the appeal vis-a-vis the police officer was really weak. I felt that the appeal versus the other count was the strongest count.

Q. The police officer count, the weak appeal count, was the count on which the probation came down?

A. No.

THE COURT: As far as you were concerned, it wasn't going to change the status of your client insofar as being free on O.R. or on—

[14] THE WITNESS: You have to understand.

THE COURT: Is that right?

THE WITNESS: Give me that again.

THE COURT: Wasn't going to change the status as far as being free or not free?

THE WITNESS: He was going to remain free on bail. I had not had any kind of communication or information at all that David had any communication with the probation office. That there had been no probation communication with him at all.

When I got the notice, I'm telling you I wasn't concerned. It wasn't because I believed—I am clear about that—that that was clear in the Court's mind as to whether or not the probation has been stayed or not. I felt though that my appeal—and I wasn't going to the court and tell them otherwise—on the police officer was a strong appeal against David. The count that he received the jail time on, which was the citizen, I thought it was extremely weak and would eventually be reversed on appeal because there was no evidence of threatening conduct by David vis-a-vis the private citizen.

MR. PENROSE: That is not what I am seeking a response to.

Q. You received a communication concerning your client?

A. That is right.

[15] Q. It was a legal pleading?

A. That is right.

Q. It had the potential, at least, to affect your client's rights?

A. Correct.

Q. In the ordinary course of your practice, I take it, you would feel a fundamental duty to communicate to your client and consult with your client concerning these proceedings?

A. It varies depending on my client and—

Q. You didn't feel you have a fundamental duty to appraise your client that legal papers are filed against him?

A. I have a duty to do that. Whether I perform that duty—

THE COURT: This letter that you wrote which he didn't receive is after the fact of the hearing. Do you recall giving him any notice in advance of the hearing?

A. No, sir, I did not.

THE COURT: You did not?

THE WITNESS: I did not. I didn't give any notice in advance. I made the appearance without David knowing about it.

THE COURT: We have a transcript.

THE WITNESS: What I am saying is what I was saying to the court is I didn't want to tell them that I had what I [16] felt was a strong appeal on that issue versus the police officer. My main concern was to keep him out of jail.

The appeal included the police officer and the citizen. I included what I thought was a very unusual argument vis-a-vis the failure of the judge to sua sponte give the instruction on self defense. I thought that that was a weak issue and I didn't know where the heck it would go. I thought the strongest appeal was on the citizen.

MR. PENROSE: Q. During the time between the receipt of the motion and the letter on the one hand and the February 27 hearing on the other hand you did have at least one phone call that you recall with the defendant, did you not?

A. I recall a phone call from David in that period of time, I think. Now, your phone records will probably show. I don't know what date that was.

Q. You do recall the conversation with him?

A. Yes, but I can't be specific as to whether—

Q. I will ask you one question at a time.

You do recall a telephone conversation with him, do you not?

A. At what period of time?

Q. In this period of time between the receipt of the motion and your awareness of it and the hearing thereon?

A. Okay. I am going to have to tell you that unless you have records to show me specifically when David made calls [17] to me I can't be specific and tell you whether or not I got a call. I did receive calls from David because I represented his family and him on numerous civil matters. I do recall, I think, getting a call from David.

Q. What do you recall was the subject matter of that conversation?

A. I think it was regarding a civil matter.

Q. What is your basis for thinking that?

A. I was representing David on numerous civil matters and he had no notice of this matter, so I imagine he was calling me regarding civil matters. It was *Collins* v. *Merchart* [*sic*] (phonetic). Also his family wanting to sue because of a property deal. His dad and mom were developing some property. I forget where it was.

THE COURT: Don't you keep notes in your file when you talk to your clients?

THE WITNESS: No. Sometimes I do, sometimes I don't.

MR. PENROSE: Q. Did you review those files to determine what this other call might have been about? Was there anything filed in *Collins* v. *Merchart*? [*sic*] Was there anything hanging about the property development matter that would have a bearing to this conversation?

A. No.

Q. Mr. Foster, I will ask you a specific question. [18] Have you made such a review?

A. No, I have not.

Q. You have not done that up to this day?

A. I have given all the files to David's present attorneys.

Q. You testified on this subject once before today and today?

A. That is correct.

Q. At no time up to today have you made a review of those files to determine how your recollection can be refreshed?

A. No.

Q. You have several phone numbers, as I understand it, that you have down in the Monterey area. You have an office number?

A. I have an office number.

Q. What is that?

A. 373–

Q. These questions I am asking you are as to those numbers as of February of 1971.

A. You will have to get clear how these numbers work. I have an office number of 373-8424. I own a peice of property with Judge William Burleigh (phonetic) in Big Sur and that number is in Bill's name and that is 667-2567. I'm there every other four months. Then I have a phone in Pacific Grove. [19] That number is 649-3671.

Q. Is that one listed to you?

A. The Pacific Grove is. The office is. The Big Sur number is listed to William Burleigh.

Q. Do you have any other numbers that you use as of February 1981?

A. No.

Now, I have to draw on my recollection as to whether or not I was—I don't know. I would have to check my calendar as to whether I was living in Big Sur at this time. You see, I trade off with Bill every other four months.

Q. With respect to D-1—

With your honor's permission, I would mark the letter as D-2.

THE COURT: All right.

(Whereupon, a letter was marked as Exhibit No. D-2 for identification.)

MS. PENROSE: Q. Do you in your office have a postage meter?

A. No.

Q. Do you know how it was that that letter came to be typed March 3rd when it has a March 2nd postmark on the envelope?

A. Well, I assume that the typist put March 3rd down. [20] Q. She would have typed that over the weekend, according to your direct testimony?

A. That is correct.

Q. So it wasn't just off by one day, it would have been off by two or three days. On Saturday or Sunday, in other words, she was putting a Tuesday date on that letter.

A. Whatever the date reflects.

THE COURT: That's your signature?

THE WITNESS: No, it isn't. It is my secretary's.

MR. PENROSE: Q. Your secretary signed off?

A. When I'm not around and I want to get correspondence out, yes, it is.

MR. PENROSE: If your honor would indulge me for just a moment.

(Pause in the proceedings.)

MR. PENROSE: Q. Am I correct that your intention in applying for the stay on November 14th was to stay off the execution of the jail sentence?

A. My application for a stay was to stay the jail sentence, that is correct. I applied basically, but all I did was apply for bail pending appeal, which he is entitled to as a matter of right in a misdemeanor. The judge released him on his o.r.

MR. PENROSE: I have nothing further.

[21] **REDIRECT EXAMINATION**

*By Mr. Stepanian:*

Q. You attempted to inform David as to the potential that he was subject to a search and seizure clause?

A. The reason I put—my specific reason for sending the letter to David was to inform him of this motion and that these conditions are now applicable to him and that he should be aware of the fact that now he could be subject to that. That's the reason I wrote the letter.

Q. Is it fair to say that prior to that time your belief was they were not applicable to him?

Let me put it this way: Did you ever write any other kind of a letter to him?

A. No, I never wrote another letter like that.

Q. Telling him you have got to be aware that you shouldn't have things like this in your residence and that the fact is your residence could be searched?

A. No. This whole thing came down—I was really upset about it. So I didn't even—I couldn't recall if he even signed the probation thing. So I went and checked that.

THE COURT: And he had?

THE WITNESS: I went to the file and I looked and I saw his signature. I was concerned as to whether or not he had actually signed it.

MR. STEPANIAN: No further questions.

[22] THE COURT: Thank you.

MS. ROSCOE: No questions.

THE COURT: Any need to recall District Attorney Bazar?

MR. STEPANIAN: Let's confer.

(Pause in the proceedings.)

MR. STEPANIAN: Two questions.

Q. Mr. Foster, did you ever write David Merchant to tell him that the probation conditions were in effect?

A. No.

THE COURT: Did you ever tell him they were not in effect?

THE WITNESS: No. I just said everything was stayed. That's all.

MR. STEPANIAN: Q. Why did you write this letter? First of all, you wrote it after the hearing in court.

A. Because I didn't believe David knew what the status of this thing was and I wanted to inform him that the judge had indicated that he was making it clear that the probation had—the search and seizure things had come into effect and he should know about it as quickly as possible.

Q. When did you feel they came into effect?

A. When I wrote that letter. That's why I wrote it.

Q. Did you have a conversation with Judge Marlowe?

A. I received a call from David. I talked to [23] Patty Bazar. My phone records will indicate. So I called Judge Marlowe, who was the sentencing judge, and I got him and I told him what I felt was going on was really unfair

because I had failed to give my client notice and that he told me he had not received my letter. Judge Marlowe indicated he would call and talk to them.

I felt that that probably wouldn't happen because of the fact that they were presently searching the residence. So I called the D.A.'s office in Santa Cruz and had the D.A.'s office receptionist call the home of David and inform him to have Patty Bazar call Judge Marlowe. I didn't know if they did it or not.

MR. STEPANIAN: I have no further questions.

THE COURT: Okay. You may be excused.

Any questions?

MR. PENROSE: Yes, your Honor.

**RECROSS-EXAMINATION**

*By Mr. Penrose:*

Q. I am not sure what you said. What I want to find out is what you thought about this.

A. I said I thought they were in effect as a result of the hearing.

Q. The language that you used in the letter—I will quote it to you—"Basically the District Attorney wanted to maintain the probationary order as active on the first count. [24] The court ordered that the probation remain effective pending the appeal."

Now, in using that language, was it your understanding that the probationary order was in effect all along?

A. No. The reason that I wrote the letter was that because Judge Marlowe indicated that it was not effective. That is what he stated in court. My choice of words may not have been appropriate.

Q. Did you have any conversations with David concerning firearms and the possession of firearms from the time of the sentence until addressing this letter to him?

A. There was a conversation that I had and it was regarding a firearm that showed up in this trial. This weapon evidentally.

Q. Which trial?

A. The trial of the misdemeanor. This weapon evidentally—and this is a general recollection some time ago—had been involved in a prior—

MR. STEPANIAN: I would object to this line of questioning. Again, this is going back to some weapon in the past.

THE COURT: Yes.

Subsequent to the sentencing, did you talk to David about the firearms in his possession?

THE WITNESS: In his possession, Judge? Can I [25] explain what I talked to him about?

THE COURT: It was after the sentencing?

THE WITNESS: Yes, sir. But it was regarding a fact that this weapon had been involved in a prior minor misdemeanor involvement. Evidently, Judge Marlowe had ordered that the attorney that David had, which is a long time prior to my becoming involved with him, sell the weapon. It ended up with David. That's on the record during the sentencing.

Then I had a conversation with Ashly (phonetic) saying he wanted to talk to David about that gun and Judge Marlowe indicated he wanted to have that thing investigated of what that attorney did. If he had done a phony sale, I guess. Then there was a few conversations with David, because I think David then talked to the attorney in Santa Cruz that had represented him in the past.

So I did talk to him about that weapon, but not about him having guns in his possession.

THE COURT: Did you know he had a gun collection?

THE WITNESS: I knew he had a gun collection prior to the jury trial, because I had been to his home and had seen a case. I'm not sure if it was pistols or it was—I am not a gun expert—or rifles.

THE COURT: Okay.

MR. PENROSE: Q. So your answer is you had one conversation with him from the time of the sentencing until

[26] the time you addressed this letter to him and that was on the subject of a gun that had come back from an earlier minor misdemeanor?

A. No. I had maybe two or three conversations. I don't know. Several conversations with him about this, because it was a continuing discussion between the police officers, myself and the court.

Q. You had several conversations with him confined to that firearm, is that a fair summary?

A. No, I had some other things with him, some civil matters, too.

Q. I am talking about firearm conversation.

A. That is about all I can recall. I don't think I ever discussed with him whether he should or should not be in possession of them.

Q. You don't recall having any conversations about whether he should or should not possess firearms?

A. No. I would be guessing. The only thing that sticks in my mind is that pistol.

MR. PENROSE: Nothing further.

MR. STEPANIAN: Nothing further.

MR. PENROSE: If counsel does not wish to, I would move the admission of D-2.

MR. STEPANIAN: Yes. Those are our exhibits.

(Whereupon, Defendant's exhibit No. D-2 was received into evidence.)

[27] THE COURT: Your next witness.

MR. PENROSE: May I release Mrs. Bazar?

MR. STEPANIAN: Yes.

THE COURT: Yes.

PHIL E. KIRKLAND

called as a witness on behalf of the government, being first duly sworn, testified as follows:

THE CLERK: State your full name and spell your last name.

THE WITNESS: My name is Phil E. Kirkland, K-I-R-K-L-A-N-D.

**DIRECT EXAMINATION**

*By Mr. Penrose:*

Q. Sir, what is your employment?

A. I am a Detective Lieutenant for the County of Santa Cruz, Sheriff's Office.

Q. How long have you been a Lieutenant there?

A. I have been a Lieutenant for three years.

Q. How long have you been in the Sheriff's Office in Santa Cruz?

A. Eight years.

Q. I want to direct your attention to Friday, February 27th, 1981.

On that day, did you have any conversations with anyone concerning a proposed search of a Highland Way property [28] belonging to or occupied by William David Merchant?

A. Yes, sir, I did.

Q. In general, what were those conversations?

A. In general, the conversation was between myself and Sgt. Robert Shipp of our department. He alerted me to a search situation on the summit and very briefly described the details surrounding it.

Q. Did the conversations that you had that day include a recitation of any prior complaints from neighbors about Mr. Merchant on that property?

A. I was informed by Sgt. Shipp that some complaints had been received with respect to shooting guns and making threats and—

MR. STEPANIAN: Excuse me. I would like, if it is going to get into that general—

THE COURT: Overruled.

MR. PENROSE: Q. Go ahead.

A. Gunshots, noises and threats were the contacts.

THE COURT: Who advised you of that?

THE WITNESS: Sgt. Robert Shipp.

MR. PENROSE: Q. The following week, did you organize a search party to go up to conduct a search of that premises?

A. Yes, sir.

Q. What was the basis on which you were going up to [29] make the search as you understood the situation at that time?

A. As I understood it, at that point, my information was from Mrs. Bazar, the District Attorney's office, the search would be conducted for weapons in violation of a probationary order by Municipal Court in Santa Cruz County. In addition, this was in conjunction with a writ of civil attachment, which was in the amount of somewhere around $15,000, which included the firearms and a bulldozer.

Q. At what time did you arrive at the premises?

A. Roughly 11:00 a.m.

Q. This was on which day?

A. This was on Tuesday, March 3rd.

Q. Who did you have along with you from the Police Department or Sheriff's Office or any other person in an official capacity?

A. Well, let's see. There was Sgt. Shipp, myself, Deputy Robert Tanner from our I.A.D. section, Deputy Augi Granco from our civil section, a civil process server, whose name I do not recall, Deputy Jessie Valdez from the Sheriff's metro unit, Officer Randy Schuler from the Santa Cruz Police Department, who is detached and assigned to the Metro Unit. There may have been a couple more, but I don't recall right now.

Q. Describe for us how the search initiated.

A. I directed the officers at the scene to take up [30] various positions around the house for our safety. Sgt. Shipp and I believe Deputy Tanner went up to the front door and knocked on the door.

A. At the time the knock on the door occurred, what were the objectives of the search? What was it that you understood you were authorized to look for and to seize?

MR. STEPANIAN: Excuse me. That's a compound question.

THE COURT: Break it down.

MR. PENROSE: Q. What did you understand that you were authorized to look for and seize at that point?

A. Firearms.

Q. The knock on the door occurred. Tell us what happened then?

A. A woman appeared at the door after a minute or so. She later was identified as Mrs. Marohn, Cleo Marohn.

Q. Then what happened?

A. We told her who we were, purpose for being there, and asked if David was home, and she said he was. She went to get him.

A short time later, David appeared at the door.

Q. Continue on.

A. We told David our purpose in being there.

THE COURT: What was your purpose?

THE WITNESS: To search for firearms, your Honor.

[31] THE COURT: You didn't talk about the civil writ of execution?

THE WITNESS: We did also mention that to him. Both issues were addressed.

He became very excited. He asked to call his attorney.

Prior to calling his attorney, I should say, that one of the deputies at the other side of the house said, "I can see a gun. It looks like an M-16 in the house."

We asked David to pass the gun out to us, again in concern for our safety, and he did. It turned out it was an R-15, which is identical in appearance to an M-16.

Thereafter, David asked if he could, as I was saying, call his attorney. I said that he could call his attorney, but he then indicated that he would have to leave the room to get the telephone number.

I did not permit that. Deputy Tanner, who was known to Mr. Merchant previously, went and escorted him to get the telephone number. David then called his attorney. A conversation of some time took place.

MR. PENROSE: Q. In the meantime, you are all waiting where?

A. All waiting out in front there. I think Tanner remained in the house with him.

At some point in time—and I can't say exactly, [32] two minutes or three minutes or four minutes—but I just determined the process was taking too long. It was a large house. I didn't know if anyone else was in there.

I said enough. We are going to be coming in now. We did come in.

Q. Did you begin your search at that point?

A. Well, not immediately. Firstly, Mrs. Bazar from the District Attorney's Office engaged in a conversation with the person I was told was Sam Foster. There was some interchange between he and her. And after that we began our search.

Q. Where did you stay during the first ten or so minutes during the search?

A. I personally remained in the living room area.

Q. To the extent you were able to, did you observe where the other people went in the house?

A. They headed toward the middle of the house, which was, as it turns out, leads up to the upstairs and to the basement and so on and so forth. David was asking us if he could get the guns and bring the guns to us, and I declined that offer.

Q. After you were there for a specific period of time, did anything come to your attention by way of seizeable items other than firearms?

A. Yes, sir.

[33] Q. Tell us about that?

A. A number of things came to my attention almost simultaneously. One—and I don't mean to be in order of occurrence because they were very nearly simultaneously—Officer Schuler brought to me a suitcase and he said the suitcase is full of qualudes. I told him to open it. I examined the contents previously and saw a large quantity of silver packaged sealed items marked qualuda, Mexican qualudes. Also the area that I was standing in, the living room, was at a doorway which leads both to a room that had been converted into something of an office. In any event, there was some filing cabinets in there and a bathoom and I could smell a strong smell of ether. In fact, I asked Mrs. Marohn what the ether was for and she said, "I don't know, maybe cleaning machine parts."

About that same time, Sgt. Shipp came to me and said he had discovered a basement wherein allegedly there was none. There was a question directed to Mrs. Marohn was there a basement to the house and she said no. I was there.

Sgt. Shipp said there is a basement down there and it is full of chemicals. There is hundreds of gallons of ether down there.

About the same time, officers came down from the upstairs bedroom and reported to me that there was another room up there which appeared to be full of chemicals and lab [34] equipment and asked me if I could come up and take a look at them.

MR. STEPANIAN: Pardon me. I would ask right now and make a motion as to hearsay statements. I assume that there are for purposes of probable cause only and I will make the objection at this time.

THE COURT: Okay.

MR. PENROSE: We are here on a suppression hearing. It is all for probable cause.

Q. You may continue to recite the hearsay.

A. I went up the stairs and I looked in this room which contained a very large quantity of lab equipment along with something growing or some sort of peat moss in

boxes and cartons. Again, all this was happening pretty much concurrently.

My attention was directed to another bedroom upstairs, which was the southwest bedroom. I think Mr. Merchant's bedroom. Somebody said there is a lot of money in here. He said you better take a look.

I went in and I was directed to three locations. One was a chest of drawers against the wall—it would be the southerly wall—and I saw in there a paper bag in which the top was open. I don't know if it could have been closed, because it was so full of money. It may have been able to be closed.

[35] Q. This was what size bag?

A. It was between what would commonly be a lunch bag and a full-size shopping bag.

Q. In between?

A. I looked in the end of it and it was stashed with wrapped $100 bills, as far as I could see into the bag. I then went—I was directed to a small dresser next to the table, a bed stand. There was a stack of $100 bills in the bed stand going down to the bottom of the bed stand.

I then looked in another dresser, which was located on the eastern wall of the residence in that same bedroom, and there was another bag.

THE COURT: Subsequently counted?

THE WITNESS: Yes, sir.

THE COURT: Counted by Internal Revenue Service?

THE WITNESS: Yes.

THE COURT: How much was it?

THE WITNESS: I can't tell you the exact figure, but I think it was around $360,000.

In any event, there was another bag. Not very good condition. Sort of shredded. There was packages of 20's, 50's and 100 dollar bills.

Also in that room I observed an infrared scope on a tripod. It was not mounted on a weapon. It was a military surplus item. There was a number of guns in the house.

[36] MR. STEPANIAN: Objection.

THE COURT: Sustained.

MR. PENTROSE: Lt. Kirkland, going back to the first item that you talked about occurring in this more or less simultaneous investigation, that is, the suitcase or briefcase with qualudes in it. Would you describe for the court the suitcase or briefcase, whatever it was.

A. It was a standard size luggage tourister, if you will, type of suitcase. Perhaps roughly 30 inches by 24 inches somewhere in that neighborhood. Standard size suitcase. Not especially large and not small.

Q. Do you know how many qualudes were inventoried out of that suitcase?

A. Approximately 1500.

Q. How were they wrapped?

A. They were wrapped in bindles [*sic*] of, I believe, 50.

Q. 50 per package?

A. Yes.

Q. And the wrapping was what material?

A. Are you referring to the packaging material or the wrapping to hold the bindles [*sic*] together?

Q. Describe the whole thing.

A. The qualudes themselves were in tinfoil, metal foil, and I can't honestly recall what held them together. I think string or rubber bands.

[37] Q. Did you handle any of these packages?

A. Yes, I did.

Q. Were you able to determine the weight of them from handling them?

A. Each one weighed several ounces.

Q. And the quantity of such packages would be approximately what?

A. I am sorry?

THE COURT: Said 1500 wrapped in bindles [*sic*] of 50 each.

MR. PENROSE: Q. Do I infer from that there were 30 some?

A. Yes.

Q. Each one with its own metallic foil wrapping?

A. They were packaged individually and then wrapped in a group.

Q. Can you give us any estimate at all of the weight of the contents of that suitcase?

A. Well, as I say, each group of 50 weighed several ounces. Multiplied out, that would be—

Q. Couple pounds, three pounds?

A. Something like that.

Q. In your experience with handguns in your career as a law enforcement officer—

A. Yes.

[38] Q. —would two or three pounds be within the weight range of a typical handgun?

A. Yes.

Q. After the discoveries that you have just recited, what did you do?

A. I sealed the residence and I spoke to Mrs. Bazar and said I wanted a telephonic warrant as quickly as possible. Told Sgt. Shipp to direct people to stop searching and meet me downstairs.

Q. What time was this that you froze the premises?

A. I'm going to estimate, Sir, that it was around noon, maybe before.

THE COURT: Around noon, your Honor.

Also, I placed David and Cleo under arrest and had them sitting on the couch in the living room there.

MR. PENROSE: Q. Were they removed from the premises shortly thereafter?

A. They were.

Q. Did you rapidly acquire the telephonic warrant that you sought?

MR. STEPANIAN: I object.

THE COURT: Tell us when you got it. How long did it take?

THE WITNESS: Three hours and thirty-six minutes.

THE COURT: What did you do while you were waiting?

[39] THE WITNESS: I sat in the front room. I argued with the District Attorney's Office.

MR. PENROSE: Q. What were the causes of the delays?

A. The causes of the delays were the first attorney I spoke with didn't want to do a telephonic warrant. The second attorney I spoke to, unfortunately, it had gone into the lunch hour. Could not find any attorneys or any magistrates. This went on until after 10:00.

I went into the procedural aspects of setting up the attorney going down to the magistrate and explaining the situation, the mechanics of setting up the conference call and the other peripheral mechanics involved, and ultimately doing the tape recording.

Q. At 3:30 you got a warrant from which judge?

A. Richard Kessell.

Q. How long did it take to completely execute that warrant?

A. Three days.

Q. In the course of executing that warrant, were certain documents seized concerning a person named Steven Tomsen?

A. Yes.

Q. What were those documents?

THE COURT: Can we have a stipulation that he [40] found these documents with the name on it and checked it out and so forth?

MR. STEPANIAN: Yes.

MR. PENROSE: Q. What were the documents?

A. Business cards, various receipts for different items, and most notably a receipt for a rental on a mini storage in Santa Cruz.

Q. Was that any effort to identify and find Mr. Tomsen?

A. We ran a computer check on the name as spelled, T-O-M-S-E-N. There were no records on file in the state of California DMV-CINI files, so on and so forth. We had no local information. No state information on the name.

Q. Was that followed up by investigation, plus the documents that were found, the basis for an application for yet another warrant?

A. Yes, Sir.

Q. For the mini storage?

A. Yes.

Q. What was found in the execution of that warrant?

A. I didn't execute the warrant. I understand Officer Piperidine did.

MR. STEPANIAN: I will object to that conclusion was.

THE COURT: Sustained.

[41] MR. PENROSE: I have nothing further.

**CROSS-EXAMINATION**

*By Mr. Stepanian:*

Q. Did you have a conversation with Mrs. Patty Bazar on Friday before the search took place?

A. I think that I did, yes.

Q. Did she indicate to you that a motion was granted to reinstate probation of David Merchant?

A. Yes.

Q. And upon her saying that, did she indicate to you that she wished to search the residence on Highland Way in Santa Cruz County?

A. Yes.

Q. And this was on a Friday. When was the earliest time that you indicated to her that you could make this search?

A. As far as I recall, Mr. Stepanian, we put the search off until Monday morning.

Q. There was a reason for that?

A. Yes. overtime.

Q. On Monday, did you again have a conversation with Mrs. Bazar concerning the mechanics of this search?

A. Very briefly. I was very busy on Monday.

Q. There was, I believe, some testimony of some homicide which you were investigating or your office was [42] investigating?

A. There had been a homicide on Sunday. I was busy making assignments with respect to that case.

Q. Your put her off in some respects to some later time to make this search based on your manpower problem, correct?

A. Correct. I was dealing primarily, Mr. Stepanian, with Sgt. Shipp.

Q. So whatever the case may be, on Friday there was an overtime problem. On Monday there was the homicide and a lot of work in the office. On Tuesday the search came together is that correct?

A. That's correct.

Q. So Mr. Shipp—who was a sergeant?

A. Yes, Sir.

Q. —was your Liaison with, for want of another word, with Mrs. Bazar at the District Attorney's Office, is that correct?

A. Yes, Sir.

Q. And you, along with several officers that you mentioned, went up to the residence, is that correct?

A. Yes, Sir.

Q. And that's Lt. Kirkland, Shipp, Ruiz (phonetic), M. Wilder (phonetic)—who was there?

A. Right.

Q. Deputy Franco (phonetic), Patty Bazar, [43] Deputy Barden (phonetic), Willdley (phonetic), Bochec (phonetic) Hartness (phonetic), Deputy Gardner, Deputy Wallace (phonetic) Deputy Persley (phonetic), Deputy Tanner (phonetic) Sgt. Morris (phonetic), Sgt. Weaver

(phonetic), Deputy Valdez (phonetic), Officer Schuler (phonetic), Jay Ashly (phonetic), C. Cook (phonetic), J. Martin (phonetic), J. Dove (phonetic), and S. Schilling (phonetic),

That was a list of the people who were present up there?

A. No, Sir. To make it easier, that's the group of people that were there over a three-day period.

Q. Those were the people there over the course of three days?

A. Yes.

Q. That was the force that was there making searches pursuant to the warrant. Some of these people that were testified to were there prior to the telephonic warrant, is that correct?

A. Correct.

Q. Do you know when J. Martin—strike that.

Do you recall if J. Dove from the IRS arrived?

A. No, I do not remember if that was the first or second day.

Q. How about Mr. Martin from D.E.A.?

A. I think he arrived late the first day. Again, I [44] am not sure.

Q. The warrant was called in at approximately 3 o'clock, correct?

A. Yes, Sir.

Q. And the warrant was finished at approximately 3:30, is that correct?

A. 3:36, I believe it was.

Q. I am going to show you a copy of the warrant and ask you to look at it and tell me whether or not that was the warrant in question that you called in.

(pause in the proceedings.)

MR. STEPANIAN: Q. There is some handwriting on that warrant which you did not write, is that correct?

A. That's right.

Q. Would you peruse that warrant and determine for me if this was the warrant in question?

A. This is the application for the warrant.

Q. This was then returned to you sometime during that day of March 3rd, is that right?

A. Yes.

Q. The arrest of Mr. Merchant and Mrs. Marohn took place approximately 11 o'clock or thereabouts on March 3rd?

A. No, I would put it closer to 12:00.

Q. Do you recall a woman named Kathy Kelley (phonetic) a sister of Mr. Merchant, coming to that residence?

[45] A. Yes, Sir.

Q. Approximately what time did she arrive?

A. I do not know what time she arrived. I don't know if she got there before or after Mr. Merchant and Mrs. Marohn were transported.

Q. Would you say it was close in time to the noon hour or the time in which they were arrested?

A. I honestly don't remember what time she got there.

THE COURT: When they were arrested, where were they taken to be booked?

THE WITNESS: To Santa Cruz County.

THE COURT: Mrs. Kelley arrived before or after?

THE WITNESS: That's what I'm trying to recall. It was somewhere close to the time they were transported.

MR. STEPANIAN: Q. It was close to the time in which they were transported than the time in which the warrant was applied for?

A. Yes.

Q. Now, how long did Kathy Kelley stay there, please?

A. Quite some time. She sat out by the swimming pool talking to me.

Q. Did you notice whether or not she walked around the area?

A. No. I was in and out of the house, of course. I only spoke to her by the swimming pool. I think her father [46] also arrived there at some point in time.

Q. The answer to the question is that you do or do not recall her wandering around or moving around that area?

A. I do not recall her wandering around.

Q. Incidentally, that is an unincorporated area of Santa Cruz, which allows firearms to be discharged, is that correct?

A. Insofar as I know, yes, it is unincorporated. As far as I know, this was a shoot zone.

Q. This was, to your recollection, a shoot zone?

A. A shoot zone.

Q. Are you familiar with when dove season begins?

A. No, sir.

Q. Now, while you were there, many of the officers, did they stay in one place from the point in time that Mr. Merchant was arrested? Were there officers that went to various portions of that premises?

A. At what point in time?

Q. From 11:30 until 3 o'clock when the warrant was applied for?

A. I directed the officers to quit searching.

Q. At what time?

A. At the time that all those items that I described to you happened. That would have been right close to 12 o'clock.

[47] Q. Now, at approximately 12 o'clock you told them to quit shooting—strike that.

A. We never shot.

Q. I understand that.

Was Merchant in one place, David Merchant, or was he around the area?

A. Before his arrest?

Q. Before his arrest?

A. He was endeavoring to roam around the house. I was endeavoring to have him not do that.

Q. It is a fact, is it not, that certain weapons were handed to you by him?

A. To me?

Q. No, to officers. The AR-15 was handed to officers by Mr. Merchant?

A. I didn't see him handing any of the guns.

Q. You were approached by an officer who came from one portion of the residence to the downstairs area and showed you a suitcase, is that correct?

A. Right.

Q. Did he indicate to you how that suitcase was opened?

A. No, Sir.

Q. Did it appear as though it was opened with a key or did it appear as though it was opened—

[48] A. I didn't notice any signs of force. So I assume it was unlocked.

Q. It was closed when it was handed to you, isn't that right?

A. It sat on the floor in front of me closed.

Q. When it was sitting on the floor and you looked at it, did you know what was inside of that, if you were not told that qualudes were in there?

A. Would I have known what was inside? No.

Q. When that paper bag was handed to you, it had some currency in it?

A. It wasn't handed to me. It was shown to me in a drawer.

Q. Was that in a drawer that was opened or closed?

A. Opened.

Q. It was opened by a police officer?

A. I assume so.

Q. When you looked at that, did it appear that there was anything else besides money in it?

A. Which bag are you referring to?
Q. The first bag you saw.
A. I don't recall seeing anything except cash.
Q. Did you touch the outside of the bag?
A. No.
Q. Was the bag opened when you get there?
[49] A. Yes.
Q. You don't know in what state that was prior to it being searched, is that correct?
A. No.
Q. Did you open up any drawers?
A. No.
Q. Did other officers open up drawers?
A. At what point?
Q. During the point prior to your telling them not to search any more.
A. Yes.
Q. Drawers were opened, closets were gone into?
A. Yes.
Q. The rooms in the house were gone into?
A. Yes.
Q. There was an open search going on, is that correct?
A. Yes.
Q. There wasn't as far as you were concerned, a directive from you limiting the scope of the searches except for the fact that they were looking for weapons, is that right?
A. My instructions to the search team in the house, echoed by Mrs. Bazar, were we are limiting this search to firearms.
THE COURT: How many firearms did you find?
THE WITNESS: Approximately 80, your Honor. 78, I [50] think, somewhere in there.
THE COURT: Were they all located in one place?
THE WITNESS: Throughout the building.
MR. STEPANIAN: Q. Most of the weapons were in one area, isn't that correct? This is a room off the bedroom.

A. I am not sure what you mean by most, counsel.

Q. Let's say there was approximately 70 weapons.

A. No, I don't think that's true. I would have to look at the evidence and photographic reports.

Q. You do no know where the weapons were found?

A. No. But I had people coming to me saying there are guns all over the place.

Q. And they were brought to you, isn't that correct?

A. That's right.

Q. And they were piled on a table?

A. That's right.

Q. These weapons, some were fairly expensive weapons, is that right?

A. Yes.

Q. And many of them were in good condition?

A. Yes.

THE COURT: Handguns and rifles?

THE WITNESS: Handguns, rifles, shotguns.

THE COURT: Automatic?

THE WITNESS: No.

[51] THE COURT: Machine guns?

THE WITNESS: There were no machine guns.

THE COURT: Collector items or just—

THE WITNESS: Collector items but not antiques. There were a few old guns, but they were not antiques.

MR. STEPANIAN: Q. This was a collection of guns?

A. This was a collection of lots of guns.

Q. Different types of guns, different categories of guns, is that correct?

A. Yes.

Q. These were in good condition?

A. Some were, some weren't.

Q. But by and large, this collection of guns was in fairly good shape?

A. By and large.

THE COURT: You say they were mostly operational?

THE WITNESS: I assume they were all operational.

MR. STEPANIAN: Okay.

Now, at one point these weapons were placed on the table in front of you and they grew to about 40 or 50 or them?

A. They grew onto the floor.

Q. 40 or 50 of them?

A. That's correct.

Q. These were rifles, handguns, et cetera?

A. That's right.

[52] Q. It is fair to say, is it not, that within about half an hour a lot of guns were put on that table?

A. That's fair to say.

Q. You've been an officer for how long?

A. Eleven years.

Q. And you have had experience in the sheriff's department with guns, is that correct?

A. Correct.

Q. Would it be fair to say that this pile of guns on the table—

How long was it before 30 to 40 were on the table, would you say, fairly rapidly?

A. 40 minutes.

Q. How long was it before the qualudes were found?

A. 50 minutes.

Q. So at least there were 40 guns or so at the 40-minute period.

When you were looking at those guns, just between us now and your expert—

A. Just between us?

Q. Sorry.

Would you say they were worth in excess of $15,000?

A. I would say that.

Q. Now, the qualudes were found after those 40 or 50 guns were found. That's at the 50-minute mark. That takes us [53] approximately to what time?

A. Ten to 12:00.

Q. Mr. Merchant had been sent away at that point?

A. No.

Q. You say 12:00.

A. He was arrested at approximately 12:00. It took a few minutes to get him transported out of there. Whatever time on his booking slip.

Q. Would it refresh your recollection to indicate that the booking slip indicates that he was booked into county jail at 11:30?

A. Let me take a look.

Q. All right. Sometime before 12:00 he was taken from the residence?

A. Somewhere around 12 o'clock.

Q. Now, you attempted to get the warrant before these problems occurred, whether it was going to be telephonic, whether someone is going to go down and get it, at that point was Merchant in the residence?

A. No.

Q. Was Mrs. Marohn in the residence?

A. No, Sir.

Q. Mrs. Kelley was outside?

A. Yes. At some point in there she arrived.

Q. And there was sufficient manpower in there to [54] freeze the residence, is that correct?

A. Yes.

Q. And at that point where you first determined that you wished to warrant, what, you had found the qualudes?

A. Qualudes.

Q. Did you find the qualudes before or after you wanted to get the warrant?

A. Before.

Q. The guns?

A. Some guns.

Q. Most of the guns, as it turns out?

A. Many of the guns.
Q. And some bills?
A. Yes, sir.
Q. Money?
A. Money.
Q. Where was the money taken?
A. To the treasurer's vault at the county of Santa Cruz.
Q. Who had control and custody of that money at the point that it left the house?
A. Who had responsibility for the money? It would certainly have been me.
Q. Who counted it?
A. The Internal Revenue Service in part and we did in [55] part.
Q. When did it leave the residence?
A. As it turns out, there were five locations where money was secreted. The first three left that night.
Q. With the Interal Revenue Service man?
A. No. With the property people from the sheriff's department.
Q. Was it counted there?
A. No, it was not counted. It was sealed and countersigned four times and placed into our safe.
Q. So you are saying before it was placed in the safe it wasn't counted, that is, the first caches of the money?
A. Correct.
Q. These were in paper bags?
A. Two of them were. One was not.
THE COURT: These are interesting matters, but they're sure time consuming.
MR. STEPANIAN: This is something in dispute that will bear directly on the problem.
Q. Let me go through this then.
You applied for a warrant and you indicated in the warrant that there were certain chemicals that were seized which you related to the magistrate.

A. That's correct.

Q. And these were the lab equipment?

[56] A. Yes, Sir.

Q. A large quantity of chemicals, lab equipment and unlawful drugs; it that correct?

A. Yes.

Q. And then you indicated—and you were more specific on page 4—as to what the drugs were you found? Here is a list of the drugs there.

A. Yes.

Q. Those were the specific chemicals that you found?

A. Yes.

Q. You don't indicate how much of the chemicals in this warrant?

A. Well, I didn't know how much.

Q. Then there was a physicians desk reference, is that correct?

A. Yes.

Q. The RCBS 10-10. That is a scale. Where was that found?

A. I believe it was on the table in the dining room area.

Q. Isn't it a fact that that is a company that specializes in scales for purposes of loading cartridges of powder for firearms?

A. I do not know what that company specializes in.

Q. It is a fact, is it not, that there was powder and [57] firearm loading equipment in the vicinity of that scale?

A. Yes.

Q. When you walked in, do you recall David Merchant saying, when you indicated the purpose of why you were there, that, "I am not on probation," you recall him saying that?

A. Yes.

Q. You had been in communication with Mrs. Bazar during the course of these days, is that correct?

A. She was with me.

Q. The telephonic warrant—

Why don't we mark this telephonic warrant. Exhibit A is the telephonic warrant.

(Whereupon, a telephonic warrant was marked as exhibit "A" for identification.)

MR. STEPANIAN: Q. This is the warrant in its entirety?

A. The application. I haven't gone all the way through it.

Q. Why don't you look through and see if that is the actual total warrant.

A. It appears to be complete.

Q. So this is the communication you had via a telephone with Judge Kessell which gave you the writ, you believed, to continue your search; is that correct?

A. Yes.

[58] Q. What time did you say that you asked that the search cease, approximately, if you can recall?

A. Noon. Right around noon.

Q. Was there any officers that came to that residence subsequent to 12 o'clock.

MR. PENROSE: Objection, your Honor. Over what period of time? Next three days?

MR. STEPANIAN: I am not sure.

Q. On March 3rd there was an order there be no more searches. However, did you notice whether any officers came to that residence subsequent to 12 o'clock? That means arrived.

A. I understand that.

Again, It is a little difficult to answer. Are you more interested in the hours after? Five hours?

Q. That is a good point. I mean from 12 o'clock until the application of the warrant.

A. I don't think any additional officers arrived.

Q. How many were there at that point?

A. Eight or nine officers.

Q. Now, where were these officers stationed?

A. Well, four or five were in the front room with me. Some were outside out of sight.

Q. Do you know whether or not any of those officers while out of your sight went to the barn?

[59] A. I do not know, but it would have been contrary to my instructions.

Q. You instructed them not to go into the barn, but you don't know whether they went in there or not?

A. No, Sir.

Q. Isn't it a fact that you received information prior to 12—strike that.

Did you receive any information from the point in time that you arrived on that premises on March the 3rd until you applied for the warrant at 3 o'clock as to what vehicles or property was inside the barn? This is a barn that's near the area.

A. With respect to the barn, the only communication I recall during that period was it looked like it was a workshop and there was a rusty can of old test tubes lying on the walkway to it.

MR. STEPANIAN: I move to strike that as nonresponsive. I am talking about inside the barn.

THE WITNESS: No. My answer stands. I was told it looked to be a workshop. Perhaps that refers to things around or inside the barn. But I was never told what was inside the barn.

MR. STEPANIAN: The only information that you received was that apparently someone said it to you. Do you recall who that was?

[60] A. No, I don't.

THE COURT: Said what?

MR. STEPANIAN: Q. Said to you that there appeared to be some sort of workshop or something of that nature.

A. I think it was Shipp. I am not sure.

Q. In the barn or the barn appeared to be this?

THE COURT: Could you see through the windows or what?

THE WITNESS: In my recollection, your Honor, the barn is two stories. The lower level of the barn had some very large sliding doors which were open already. The upstairs portion was padlocked. You could not see.

MR. STEPANIAN: Q. How far was it from the residence?

A. I would estimate 75 feet.

THE COURT: Any questions?

MS. ROSCOE: I have just a few.

**CROSS-EXAMINATION**

*By Ms. Roscoe:*

Q. LT. Kirkland, when you first arrived, did you see Cleo inside the kitchen area?

A. No, I didn't.

THE COURT: She came to the door, he said.

THE WITNESS: I went up and knocked on the door.

[61] MS. ROSCOE: Q. And she answered it?

A. Yes.

Q. The area that you called the living area, is that off of the kitchen area?

A. Well, there are two rooms but not partitioned off so I guess you could say that. It is clear one is a kitchen and the other is a living room, but there is no wall.

Q. Then a small area off where files and paper material is kept?

A. There is a doorway with no door on it. As I recall, there is a little hallway. Turning left you would go into the office area, if you will. Turning right you would go into the bathroom.

Q. Then if you went out of that main area and across the hall, you would come to a workshop, is that not correct?

A. Opposite the living room of the lower floor there is a workshop.

Q. And there is machinery and tools and items of that nature in there?

A. Yes.

Q. Did you stay in the kitchen-living room area, is that where the guns were collected?

A. Yes.

Q. Do you know where other officers went?

A. Only from what they told me.

[62] Q. Did you direct them to specific rooms?

A. No.

Q. Did Cleo stay with you in the kitchen area?

A. Yes.

Q. Was she free to leave at any time?

A. Up until the qualudes were found, they were free to leave. In fact, she got out the front door right about the time they were found and return was requested.

Q. Was your permission for her to leave for a doctor's appointment?

A. Yes.

Q. And you gave her that permission?

A. Yes.

Q. And she went out of the house?

A. She started out of the house.

Q. Did you send someone after her?

A. I did.

Q. During the period of the time she was out of the house, is that when the qualudes were found?

A. Again, now, all of these events were happening almost simultaneously but very close to that time frame when that occurred.

Q. Then they were brought to you in the kitchen area?

A. Yes.

Q. And then you sent someone outside to instruct Cleo [63] to come back?

A. Sgt. Shipp and I sort of did that simultaneously. He was coming up from the basement. Told me about this stuff.

Q. What I am asking is whether you personally sent someone outside to instruct her to come in?

A. I yelled out, "Bring her back," or "Stop her."

Q. To whom did you yell that?

A. I think that it was Deputy Valdez, but I am not certain in that regard.

Q. Prior to your opening the suitcase, until that point, she was free to leave and in fact was in the process of leaving?

A. Yes.

Q. Now, where was she standing when you asked her the question about the ether?

A. At the sink.

Q. The kitchen sink?

A. Yes, Ma'am.

Q. And you asked her what the ether was for?

A. I could smell the ether strongly. I said, "What's the ether for?" she said, "It's for cleaning machinery." She said, "I don't know, maybe cleaning machine parts."

Q. At that point, had Officer Shipp gone to the basement?

A. It was at that point. Right in that area.

[64] Q. It was afterwards or before?

A. I do not recall.

Q. And do you recall Sgt. Shipp asking Cleo Marohn where the guns were?

A. No.

Q. Did you ever hear him ask her any questions about the guns?

A. No.

Q. Did you hear her reply or say to him, "There are no guns in the basement."

A. No. I did hear her say there was no basement, though.

Q. In that context, did she mention firearms?

A. No.

Q. Did you hear Shipp's question to her and that response back?

A. "Is there a basement?"

Q. That is what you heard Sgt. Shipp say, "Is there a basement?"

A. I can't say those were the exact words, but the point of the question was to determine whether there was or was not a basement.

Q. Then at that point, did you see what he did?

A. Yes. He walked over and behind the stairwell.

Q. Was she still in the kitchen at that point?

[65] A. She was.

Q. Did she ever go upstairs, to your knowledge?

A. I don't recall her going upstairs. She may have gone upstairs. In fact, if I may, I do recall that she asked to go upstairs to get some money. But that was after she was arrested, I believe. She got some money from upstairs. I am not sure when that was.

Q. Do you know what time she was transported to the county jail?

A. Sometime shortly after 12:00, I believe.

MS. ROSCOE: Thank you.

THE COURT: Okay. Any more questions?

MR. PENROSE: Just a couple, your Honor.

**REDIRECT EXAMINATION**

*By Mr. Penrose:*

Q. Are you in any way an expert in appraising the value of guns?

A. No, I am not.

Q. When you got the 40 or 50 guns, did you feel it was up to you to say, okay, this is $15,000 worth, we should stop?

A. Well, that wasn't really my thought. My thought was with respect to the probation violation, that any gun would constitute a violation, hence we continued our search.

THE COURT: Anybody from the civil division go up with you?

[66] THE WITNESS: Yes.

THE COURT: Who was that?

THE WITNESS: Deputy Ogie Franco and another man who was a civilian whose name I do not know.

MR. PENROSE: Q. When you said you didn't know the quantity of chemicals when you were speaking with Judge Kessell, was there an abundant quantity of each chemical?

A. Abundant quantity, yes, Sir.

Q. Just so the record will be clear and the court will understand the layout of the terrain there, I want you to describe the way the barn in constructed.

Is it constructed on a flat piece of land or a slope?

A. It is a tier construction. It is on the side of a hill.

Q. So there would be two ground levels?

A. If you approach it from the up slope.

Q. It was the upper story that was locked up?

A. That's right.

Q. And the bottom story was open doors at the time?

A. That's right.

MR. PENROSE: I have no futher questions.

MR. STEPANIAN: Just two questions.

[67] **RECROSS-EXAMINATION**

*By Mr. Stepanian:*

Q. The IRS people, do you recall whether or not they came—how many came on the first day?

MR. PENROSE: This is beyond the scope of redirect and I don't understand the relevance.

MR. STEPANIAN: It's a little unclear.

THE COURT: Do you recall that?

THE WITNESS: Mr. Stepanian, No, I do not recall when they came. I spoke to them that evening around 4:00 and alerted them to the situation. I don't remember if they came up that night or the next morning.

MR. STEPANIAN: Q. Do you know whether it was that Tuesday night or Monday morning?

A. No, I don't remember. But they were there at least on one of those two days, yes.

Q. How many?

A. I was never back to the residence after that first day, so I do no know how many went to the house. I saw three down at my office.

Q. Did they say they had been there?

A. One of them said that definitely.

Q. Sheriff Norren (phonetic), was he there?

A. At the house, yes.

Q. Now, just before you went into the house, it's a [68] fact that a weapon was in the hands of Tanner, is that correct?

A. A shotgun.

A sheriff's office shotgun?

Q. Yes.

A. Yes.

Q. He had a shotgun in his hands?

A. I believe so.

Q. That was the weapon that was drawn among the individuals that walked up to the door, is that correct?

A. It's hard to holster them, yes, sir.

Q. It was pointed in the general direction of the door. That was a glass door, is that right?

A. I don't think so. I think he was holding it port arms.

Q. Did you see him tap it on the glass?

A. No, I didn't. He may have.

Q. Did you notice how Sgt. Shipp went down into the basement?

A. No. All I could see was him rounding the corner of the banister that goes also upstairs.

Q. You didn't see how he got in?

A. No.

THE COURT: Your next witness.

MR. PENROSE: Government calls Inspector Otis Pogue

[69] OTIS HARVEY POGUE,

Called as a witness on behalf of the government, being first duly sworn, testified as follows:

THE COURT: State you full name and spell your last name, please.

THE WITNESS: Otis Harvey Pogue, P-O-G-U-E.

**DIRECT EXAMINATION**

*By Mr. Penrose:*

Q. Inspector Pogue, what's your employment?

A. I am an Inspector with the District Attorney's Office of Santa Cruz County.

Q. How long have you been with them?

A. Approximately five years.

Q. I want to direct your attention back to the fall of 1980. Little less than a year ago.

Did you back in that period of time have occasion to come in contact with a case involving a defendant named William David Merchant?

A. Yes, I did.

Q. Describe for us that first contact you had?

A. Yes, Sir.

It came from an investigation request from Patty Bazar requesting that I test fire a weapon that was involved in a brandishing incident.

Q. Did you do that?

[70] A. Yes, I did.

MR. STEPANIAN: Could we have a foundation as to the date and time that this occurred.

THE COURT: In the fall of '80, you say?

THE WITNESS: It was August 5th.

MR. PENROSE: Q. August 5 of 1980?

A. Yes.

THE COURT: Test fire a weapon, you say?

THE WITNESS: Yes, Sir.

MR. STEPANIAN: Your Honor, I would say anything prior to the sentencing of November 14th is irrelevant to these proceedings.

THE COURT: Yes. Makes no difference to me. Just how he got acquainted with the case. That's all.

MR. PENROSE: Q. What was the next contact you had with any matter involving the prosecution of Mr. Merchant?

A. Probably have been after I observed the serial number of the gun and compared this to a previous case in 1976 which involved Mr. Merchant who was convicted—

MR. STEPANIAN: Again, your Honor—

THE COURT: Sustained. He is familiar with the case. Let's get down to the case itself.

MR. PENROSE: Q. Did you have occasion sometime in the fall of 1980 to make an inspection of the area around Mr. Merchant's property on Highland Way?

[71] A. Yes, Sir, I did.

Q. Approximately when was that with relationship to the November 14th, 1980, sentencing?

A. It would have been late October, prior to the sentencing.

Q. How was it that you had gone up there?

A. Again, Patty Bazar.

Q. What was your purpose in going up there?

A. Attempting to locate and photograph an alleged sign that had been alluded to by several police officers on Mr. Merchant's property.

THE COURT: Sign?

THE WITNESS: Yes, Sir.

MR. PENROSE: Q. Did you find the sign?

A. No, Sir, I did not.

Q. When you didn't find the sign, did you conduct any interviews or investigation to try to get a location on the sign?

A. Yes, Sir, I did.

Q. Who did you speak with in that context?

A. First contacted a Mrs. Williams who lives in that particular area.

Q. Can you give us any idea as to the distance—can you give us any idea where her residence was with respect to Mr. Merchant's?

[72] A. Yes. Her residence is adjacent to the Collins' who are adjacent to Mr. Merchant. So she is two doors down. Some distance separates them, though.

Q. And did you have discussion with Mrs. Williams on that occasion?

A. Yes, Sir, I did.

Q. What did Mrs. Williams say to you in summary concerning Mr. Merchant?

MR. STEPANIAN: I object to it as calling for hearsay.

THE COURT: Sustained.

This is about the sign. Talking about the sign?

THE WITNESS: No, your Honor. This is concerning complaints in the neighborhood concerning Mr. Merchant.

THE COURT: This is not for the fact but just for the state of mind. Overruled.

THE WITNESS: She related the numerous problems that she and the Collins' had over the period of years with Mr. Merchant.

MR. PENROSE: Q. Did these problems include firearms, according to her?

A. Most definitely.

Q. As a result of your talking with Mrs. Williams, did there ensue over the following months a series of telephone calls that you received from Mrs. Williams?

[73] A. Yes, Sir, they did.

Q. How many telephone calls would you estimate that you received from Mrs. Williams in a period starting between the November 14, 1980 sentencing and March 3 of 1981?

A. I would estimate approximately eight to ten.

Q. Can you give us a general overview of the text of those calls?

A. Generally, it would be Mrs. Williams calling either to find out how the case was going or to report that the same activity was still going on.

Q. Same activity being what?

A. Shots being fired.

Q. From where?

A. From Mr. Merchant's property.

MR. STEPANIAN: Again, your Honor, I would just—

THE COURT: You may have a standing objection.

MR. PENROSE: Q. What did you do once you received such a complaint from Mrs. Williams?

A. I relayed those to Patty Bazar.

Q. You testified you went up once looking for a sign.

A. Went up twice, actually.

Q. Tell me about the second visit.

Did you have occasion to talk to anybody during the second visit to the area?

A. No, I didn't, as I recall. On the first visit, we [74] passed over it, but I talked to two people. I first had contact with Mrs. Williams. The second one was with Mr. Collins.

Q. Same day?

A. Same day.

Q. As a result of those conversations, that conversation with Mr. Collins, did you get any phone calls from her in the period between November 14, 1980 and March 3?

A. I believe I got one from Mr. Collins.

Q. What was the context of that call?

A. He had observed what he believed to be marijuana and wanted to report that to me and wanted some assistance and said it could be seen from his property onto Mr. Merchant's property.

Q. Did you investigate and was that subsequently determined to be unfounded?

A. Yes, It was.

Q. Are you a member of an Elks Club anywhere?

A. Yes, Sir, I am.

Q. Did you have occasion sometime in the first couple of months of 1981 to have a discussion at an Elks Club meeting in which Mr. Merchant came up in the subject matter?

A. Yes, I did.

Q. Would you recite that conversation?

A. Yes, Sir.

[75] I was approached by one of the Elks members who I had seen and occasionally chatted with. I don't know his name. He knew that I worked for the District Attorney's Office and said he would like to talk to me for a moment.

He relayed that his daughter lived on Old San Jose Road.

MR. STEPANIAN: I would object.

THE COURT: Sustained.

Can't you identify this person?

THE WITNESS: Identify him by sight. I don't know his name.

Like I said, there is several hundred members there. I know a lot of them by sight, but I don't know his name.

MR. PENROSE: Your Honor, I think that it is undisputed that probable cause can be—we are not talking probable cause here. We are talking here reasonable grounds in the context of a probation search. Hearsay is admissible—

THE COURT: But this is hearsay. You don't even know who the person you are talking to is.

MR. PENROSE: I don't believe it is required that the source of hearsay in a probable cause context can be identified. Commonly we're dealing with anonymous informants in the context of probable cause. So I think that this [76] evidence is admissible and again going to the state of mind of the Santa Cruz Officials in having reasonable grounds to conduct this search.

THE COURT: This guy is going to say his daughter lives up there and something happened up there. Make an offer of proof.

MR. PENROSE: Your Honor, this is exactly the offer of proof: This would be a report by this Elks Club member to inspector Pogue concerning information received from his daughter about Mr. Merchant and firearms.

THE COURT: That's cumulative. Sustained.

MR. PENROSE: Q. Do you know of a man named Bruce Wrenn?

A. Yes, I do.

Q. Did you have conversations with Mr. Wrenn concerning firsthand experience Mr. Wrenn had with Mr. Merchant during this time period of November '80 to March of '81?

A. Yes, Sir, I did.

Q. Would you recount that conversation?

A. Yes, Sir.

I received a call from Mr. Wrenn, I believe it was, on the 4th of February. I received a call the day prior and I had been out.

Mr. Wrenn related that he lived on Old San Jose Road and described the property and that he had met [77] Mr. Merchant as Mr. Merchant had cut down a tree on Mr. Wrenn's property. He had made a report to the sheriff's department of that.

He approached Mr. Merchant and confronted him about the cutting of the tree. Mr. Merchant –

MR. STEPANIAN: Excuse me, Mr. Pogue. This has no relevancy to the Highland Street property. This is San Jose property. It is someplace other than the subject property in this case.

THE COURT: I think he had a conversation with Mr. Merchant.

Did you have a conversation with the defendant?

THE WITNESS: Mr. Wrenn did.

THE COURT: Concerns of the same individual?

MR. PENROSE: Yes, Your Honor.

Q. You may proceed.

A. During the confrontation about the cutting of the tree, Mr. Wrenn received what he thought was a threat, because Mr. Merchant had alluded to the fact that his girl friend carried a .44 magnum weapon.

Q. Did you pass these complaints on?

A. Yes, Sir, I did.

MR. PENROSE: If I may show a document for a moment to counsel.

Your Honor, may I approach the witness?

[78] THE COURT: You may.

MR. PENROSE: Q. Inspector Pogue, I am showing you a xerox sheet containing what purports to be message slips, telephone message slips.

Can you tell us what they are?

A. Yes, sir.

These are message slips that are filled out by the receptionist at the District Attorney's Office if we are not in to

receive a phone call. It has the name of the caller, return phone call number and on occasion what it is in reference to.

Q. What are the dates from the caller depicted there?

A. Each of them are to me. The first one is the 2nd of January. Time is 3:53. It is from Joan Williams. Call back number. Reference Merchant.

Q. Taking that first slip as typical, can you make a search through your records to retrieve those message slips?

A. Yes.

Q. There is not a year that appears on those dates?

A. It is '81.

THE COURT: How many do you have?

THE WITNESS: I have a total of four.

THE COURT: Are those not included in the eight to ten you mentioned before?

THE WITNESS: It would be included in those.

[79] MR. PENROSE: That is marked as G-1 in the lower right-hand corner?

A. That's correct.

MR. STEPANIAN: I would interpose an objection, your Honor, as to the introduction of these items in that they are hearsay.

THE COURT: He's already testified he received eight to ten calls.

Are you contending that Mrs. Williams did not call eight to ten times?

MR. STEPANIAN: I don't know because I have never spoken to her.

THE COURT: It will go unchallenged.

MR. STEPANIAN: Let's see on Cross-Examination.

MR. PENROSE: Q. As I understand it, you were not available and did not participate in the search of March 3 of Mr. Merchant's residence, is that correct?

A. No, sir.

MR. PENROSE: I have nothing further.

CROSS-EXAMINATION

*By Mr. Stepanian:*

Q. Mrs. Williams and Mr. Collins are neighbors, is that correct?

A. That is correct.

Q. And they live in close proximity to each other?

[80] A. That is correct.

Q. And they live in area commonly referred to as Highland Road, is that right?

A. That's correct.

Q. And they live close by David Merchant's house?

A. Correct.

Q. Or the house that was searched in this case, correct?

A. Correct.

Q. Do you know which house was built first?

A. No, I do not.

Q. Do you know who moved into that area first?

A. In reference to whom?

Q. In reference to Mr. and Mrs. Williams?

A. No, I don't.

Q. How about in reference to Mr. and Mrs. Collins?

A. Who moved in first in reference to whom?

Q. Mr. Collins in reference to Mr. Merchant.

A. As I recall, Mr. Merchant was living there when Mr. Collins moved in.

Q. Right.

It is a fact, is it not, to your knowledge that Mr. Williams moved in after Mr. Merchant?

A. I don't know that to be a fact.

MR. PENROSE: I object to the relevancy.

[81] THE COURT: Overruled.

MR. STEPANIAN: Q. Now, he talked with Mr. Williams or—

A. Mrs. Williams.

Q. Did you have occasion to talk to Mr. Williams?

A. Yes, I have.

Q. Did you talk to Mrs. Williams with Mr. Williams?

A. No.

Q. Did you talk to Mrs. Williams with Mrs. Collins?

A. No.

Q. Did you ever talk to Mr. Collins and Mrs Williams?

A. Together you mean?

A. Yes.

A. No.

THE COURT: You have another combination?

MR. STEPANIAN: That's enough for me.

Q. But you talked with Mrs. Williams and Mrs. Collins?

A. Not together.

Q. It is a fact, is it not, Officer Pogue, that there was acrimony between Mr. Collins and Mr. Merchant?

A. I would believe that to be true, yes.

Q. This was a feud between these people for a considerable amount of time?

MR. PENROSE: Objection to the characterization.

THE WITNESS: I am not sure "feud" is the word.

[82] THE COURT: Overruled. He can say yes or no.

THE WITNESS: I was aware there had been some civil litigation and some arguments back and forth.

THE COURT: Would you state there is some bad blood between them?

THE WITNESS: They certainly didn't like one another.

MR. STEPANIAN: Q. And the Williams family and the Collins family are friends?

A. Yes.

Q. And Mrs. Williams complained about Mr. Merchant, correct?

A. Correct.

Q. And Mr. Collins complained about Mr. Merchant?

A. Correct.

Q. Now, I think your testimony was that there was some gunfire in that area.

A. Yes.

Q. Was there any testimony about gunfire coming from any of the other parts of the area?

A. No.

Q. So the only gunfire that Mrs. Williams talked to you about was the gunfire that was coming from the Merchant area, is that correct?

A. That's correct.

[83] Q. Where on the Merchant area did they say?

A. She didn't specify.

Q. How big is that area?

A. It includes several acres. I don't know exactly.

Q. What portion of the acreage did she say this came from?

A. She didn't specify.

Q. Did she see anybody on the property?

A. Firing the weapon?

Q. Yes.

A. No.

Q. Did Mrs. Collins, talking about these times when they called, Mr. Collins called once?

A. Mr. Collins called once.

Q. How many times did Mrs. Collins call?

A. I don't recall her calling. I had a conversation with her at her house.

Q. Did Mrs. Collins say from what part of the area of the several acres here the gunfire was coming from?

A. No.

Q. How about Mr. Collins, did he say what area?

A. At times he had specified that it was coming from around Mr. Merchant's house.

Q. Where around Mr. Merchant's house?

A. He didn't specify any particular area.

[84] Q. Did he see anybody shooting the guns?

A. He never told me he saw anybody shooting the gun. He had seen Mr. Merchant in possession of a rifle.

Q. Was that in the conversation he had with you?

A. Yes, it was.

Q. And where did he say he had this rifle?

A. Mr. Merchant was sitting on a fence and at some point Mr. Merchant points the rifle in his direction.

Q. Did he make a complaint about that?

A. No. He had made numerous complaints to the sheriff's department. He was reiterating things that had happened to give me an idea of what had been going on in that area.

Q. He didn't like Mr. Merchant?

A. He appeared to. I don't know if Mr. Merchant liked him or not.

THE COURT: Anything else?

MS. ROSCOE: If I may. Just a few questions.

**CROSS-EXAMINATION**

*By Ms. Roscoe:*

Q. Inspector Pogue, is it correct you went out in the vicinity of the Merchant property three times between the November 4th date of 1980 and the March 3rd date?

A. I believe two.

Q. Twice you went up looking for a sign?

[85] A. Uh-huh.

Q. And that was at the request of Mrs. Williams?

A. No.

Q. Of Mr. Collins?

A. No.

Q. Of either of those two persons?

A. No.

Q. Then another time you went up looking for marijuana?

A. No.

Q. You never went up there looking for marijuana?

A. No, I did not.

Q. You received a telephone complaint that there was marijuana growing on the Merchant property?

A. Correct.

Q. Then did you report that to anyone else?

A. Yes, I did.

Q. Who was that?

A. Reported it to Bob Shipp of the Narcotics Bureau, Sheriff's Department.

Q. Did you also report it to Patty Bazar?

A. Yes, I did.

Q. Were you and Patty Bazar working as a team investigating this case?

A. No.

[86] Q. Of the eight to ten times when Mrs. Williams called you, part of those calls were requests for information as to the case proceeding?

A. Some of them were. Wanted to know what was going on. Why there was delays.

Q. Were any of those conversations regarding the civil suit—the judgment that they were attempting to collect?

A. I was aware of it, but I don't believe any conversations with Mrs. Williams concerned the civil suit.

Q. What about with Mrs. Collins. Did she discuss the civil judgment with you?

A. I think only to tell me that it existed.

Q. Mr. Collins, did you discuss the civil judgment with him?

A. I don't recall, no.

Q. Did they request your help in executing the writ?

A. No.

Q. Did you discuss the execution of the writ with either Mr. or Mrs. Collins?

A. No.

Q. To your knowledge, did Mr. or Mrs. Collins, were they aware that the writ was going to be executed on March 3rd?

A. Not to my knowledge.

Q. Did you bring all the message slips that you had in your possession concerning the Merchant property?

[87] A. And the dates concerning the March date when the search warrant was executed.

Q. So those four message slips represent the calls that you received but did not immediately communicate with?

A. They represent calls that I received, calls that I was not in and they took a message from January 1st until March 3rd.

Q. There were four of those?

A. Right.

Q. And then you had eight to ten phone calls from Mrs. Williams?

A. I believe so.

Q. And how many would you say from Mrs. Collins?

A. None.

Q. And one from Mr. Collins?

A. Yes.

Q. Any from Mr. Williams?

A. No.

Q. Regarding the tree cutting, did you investigate that incident?

A. To the extent I retrieved the Shriff's [*sic*] Department report and passed on that information along with the report to Patty Bazar.

Q. Did you ever ascertain on whose property the tree was?

[88] A. From Mr. Wrenn. He complained that it was on his property and that's what he reported in the report to the Sheriff's Department.

Q. You have no further knowledge as to the location of the tree other than his representations?

A. I've seen the area the tree was in, yes.

MS. ROSCOE: Thank you.

**FURTHER CROSS-EXAMINATION**

*By Mr. Stepanian:*

Q. When was it that Mr. Collins called you?

A. It was on the 30th of January.

Q. And was that when he complained about the marijuana?

A. I believe it was, yes.

Q. And he talked to about shooting, too?

A. No. The shooting came actually after the execution of the search warrant. I went out and talked to Mr. Collins.

Q. Related to the gun incident?

A. I think that probably occurred at that time. I think there was some discussion on that phone call about the shooting incident, but I don't know to what extent. I know it was mentioned.

Mr. Stepanian: I would ask that be stricken.

Q. That's what I wanted to clear up on the foundational part. It occurred subsequent to the execution of the [89] search warrant after March 3rd?

A. The conversation about the pointing of the gun probably occurred after March 3rd.

MR. STEPANIAN: I would ask that be stricken.

THE COURT: Granted.

Do you mean the girl friend carrying the pistol?

THE WITNESS: When he was pointing the rifle.

THE COURT: That may be stricken.

MR. STEPANIAN: Okay. I just want to clear that up.

MR. PENROSE: I do have one item of redirect.

**FURTHER CROSS-EXAMINATION**

*By Ms. Roscoe:*

Q. Inspector Pogue, did Mr. Wrenn tell you that Merchant's girl friend carried a .44 magnum?

A. He said Mr. Merchant told him that.

Q. That she carried it around?

A. That's what he told me.

Q. Did he say he had ever seen her with any weapon at all?

A. No, he didn't say that.

Q. Did he indicate that he knew her?

A. No.

Q. Did you know who he was referring to when he referred to Merchant's girl friend?

[90] A. I suspected, but I didn't know.

Q. Who did you suspect?

A. I suspected it was the person he was living with on the Highland Way property.

Q. How did you have that knowledge that he was living with someone at the Highland Way property?

A. It had been passed on to me through other means and a police report of the brandishing in 1980.

Q. Were you investigator in that case?

A. Only to the point of test firing the weapon.

Q. So you were aware of her identity through those reports?

A. Yes, I was.

MS. ROSCOE: Thank you.

**REDIRECT EXAMINATION**

*By Mr. Penrose:*

Q. Did you form an opinion concerning the past record of Mr. Merchant in divesting himself of firearms upon court order?

A. Yes, I did.

MR. STEPANIAN: I object to that.

THE COURT: Sustained.

MR. PENROSE: Your honor, may I be heard for a moment?

THE COURT: We called the officer here to testify [91] to knowledge about the shooting up there as a justification for the search, right?

MR. PENROSE: I am offering Inspector Pogue for every relevant purpose I can.

THE COURT: He hasn't indicated—I guess he told the District Attorney Bazar about the shooting, right?

You passed the information on?

THE WITNESS: Yes, sir.

THE COURT: You want to know about divesting himself of weapons?

MR. PENROSE: If I may make a specific offer of proof.

We don't have a jury in the box. I know the court wants a complete record.

The offer of proof was there was a prior conviction for brandishing.

THE COURT: I know.

MR. PENROSE: That there was an order that the gun be disposed of and not retained by the defendant. There was a finding by Inspector Pogue, investigative finding, that what in fact happened was the weapon was supposedly sold to Mr. Merchant's previous defense attorney and then resold by the defense attorney back to Mr. Merchant's girl friend.

THE COURT: That came out in the transcript. He sold it and somehow got it back. Unless it had something to do [92] with the decision to make the inspection, it is not relevant.

MR. PENROSE: Your honor, I think all of these factors are—

THE COURT: Who made the decision to go up and make the search?

MR. PENROSE: Your honor, it was made, I think, jointly among sheriff's office people and the district attorney's office people. All of these factors would have played a role.

THE COURT: The knowledge would have to be in the mind of the person who made the decision to make the search. There is no showing that Officer Pogue was that person. Maybe he participated in the discussion. Then it would be all right.

MR. PENROSE: Q. Inspector Pogue, did you ever report to anyone else at the District Attorney's Office or anybody in the Sheriff's Office of what you had learned concerning the circumstances of the firearm in a previous brandishing conviction being disposed of and then reacquired by Mr. Merchant?

A. Yes, sir, I did.

MR. STEPANIAN: I would say that this is irrelevant and that it goes beyond our discussion in these proceedings here. It gets into character evidence.

THE COURT: It is only received for the purpose of a belief on the part of a searching officer that he had [93] possession of the weapon in violation of the instructions of the court.

MR. STEPANIAN: Your Honor, I believe the only way we are going to delve into this is to show the history of that weapon. In fact, I believe, although I am not sure, that Mr. Merchant was not on probation at the time that that weapon was in his possession.

THE COURT: Which one are you talking about?

MR. STEPANIAN: This weapon that I believe Mr. Penrose is making the subject of his offer of proof. We're getting into a case where we're going way back into a situation where a weapon apparently got back into the hands of Mr. Merchant. There was colloquy between he and the Judge.

The precise definition of what that original order was concerning that weapon is ambiguous.

The Court: The point is whether or not this witness thought there had been a violation and this witness conveyed it to another person who made the decision to then make the search. I am not accepting it for the truth of the matter that there was such an occurrence. If these people thought he was playing around with guns and he wasn't supposed to, that goes to the state of mind when they decided to make a search. I've not yet got the foundation as to who he communicated it to and when.

Mr. PENROSE: Q. Who did you communicate your [94] findings concerning the reacquisition by Mr. Merchant of the firearm?

A. First it was to Patty Bazar and then I presented that to Mr. Tanner of the District Attorney's Office.

THE COURT: When?

THE WITNESS: Shortly after I found it out. August of 1980.

THE COURT: Before he was sentenced?

THE WITNESS: There was a progression of things that happened after that. Also Judge Marlowe was made aware of that. Judge Marlowe requested that this issue be followed up to find out how he came to have the weapon in his possession. This was the November 14th sentencing.

MR. PENROSE: Q. You told that to District Attorney Tanner and to his assistance, Patty Bazar, at some time before November 14, 1980?

A. That's correct.

Q. What was it you told them?

MR. STEPANIAN: I would object.

THE COURT: You have to stand up.

THE WITNESS: The year of this prior situation was, I believe, 1976. So we're getting—

THE COURT: Sustained.

MR. PENROSE: I have nothing further.

THE COURT: That's all. Thank you, Inspector Pogue.

[95] MR. PENROSE: I move the admission in evidence of G-1.

THE COURT: May be received.

(Whereupon, exhibit no. G-1 was received into evidence.)

PATRICIA ANNE BAZAR

called as a witness on behalf of the government, being first duly sworn, testified as follows:

**DIRECT EXAMINATION**

*By Mr. Penrose:*

Q. Mrs. Bazar, you are an Assistant District Attorney in Santa Cruz County, is that correct?

A. Yes.

Q. How long have you been so employed?

A. Almost two years.

Q. In the course of your duties as an Assistant D.A., have you had an occasion to handle and prosecute cases in which William David Merchant, III, was a defendant?

A. Yes.

Q. What were the charges on the first such case that you can recall prosecuting—strike that.

How many cases?

A. Almost one to its completion. That was the 417, 417-B.

Q. That would be brandishing firearms?

[96] A. Yes.

Q. When were those charges brought, approximately, month and year?

A. Trial was in probably October. Probably eight months prior to that. I don't really—

THE COURT: There is no dispute that there was a prosecution and a conviction.

MR. STEPANIAN: No, your honor.

MR. PENROSE: All right.

Q. When was the sentencing in that case?

A. I think the 14th of November.

Q. After the sentencing in that case and prior to March 3 of 1981, did you have occasion to receive complaints and reports of complaints concerning firearms being discharged around Mr. Merchant's property or firearms and Mr. Merchant?

A. Yes.

Q. Would you recite those complaints?

MR. STEPANIAN: It is a compound question. Can we compartmentalize it.

THE COURT: You received complaints about the firing of firearms on the Merchant property, is that correct?

THE WITNESS: Right.

THE COURT: How many and when did you receive them? Can you recall?

THE WITNESS: I don't remember an exact number. [97] I had gotten to know a number of the neighbors through my original investigation in the misdemeanor matter. I believe that after the sentencing—that would have put us right in the holiday period. I didn't remember specifically receiving any the end of November or December. I think things quieted down for a period of time.

Then it seems to me that they started up again sometime the first to the middle of January. I think the first thing I specifically remember was sometime in the middle of January when I went with—

THE COURT: Let's stay with the complaints first.

Who did you receive them from?

THE WITNESS: This was a complaint from Mrs. Collins.

MS. PENROSE: Q. Was this a telephone call or face-to-face?

A. This was face-to-face.

Q. Where did this occur?

A. I was up at her house.

Q. What was the occasion?

A. I had gone with Sgt. Shipp and another deputy, because they were going to check some type of plant that was on the border between the Collins' and Mr. Merchant.

Q. Was this the subject of a complaint, the plant?

A. Yes.

[98] Q. Did the complaint turn out to be unfounded?

A. Yes.

Q. So in the course of your visit there, what was the conversation that you had with Mrs. Collins concerning Mr. Merchant and firearms?

A. Well, I stayed behind with Mrs. Collins. I had met her before on a few other occasions. I asked her how

things were going. She then went into a long discussion of the fact that they were having repeated problems with Mr. Merchant and how the gunfire—the shots were going on all the time and how scared she was because of her kids, et cetera, et cetera.

Q. Did she recite any particular measure she had taken concerning her children?

A. Yes. I think she described it as living in a combat zone. She said she had small school-age children and she felt bad because when the fire started they remained inside until the gunfire stopped.

MR. STEPANIAN: I would object to any of these statements as hearsay.

THE COURT: For the same reason that the other complaints were received. Not [to] establish the truth of the matter but to establish the state of mind that she was investigating.

You have a continuing objection to this line of questioning.

[99] MR STEPANIAN: I would also like to make another statement. That is, as far as cause to go up to that residence, these kinds of—

THE COURT: This is not argument time. You can argue that when the evidence is in.

MR. STEPANIAN: Okay.

MR. PENROSE: Q. Did you hear again from the Collins', either one of them, between the time that you visited, as you just described, and March 3 of 1981?

A. Yes. I think when I was talking to Mrs. Collins she indicated to me that her husband was keeping a record of these types of disturbances or was sort of keeping a log of what was going on up there in relation to his civil case.

I indicated to her that I would like to talk to him or have him talk to the investigator in our office.

I had a later conversation just over the phone. I don't believe I've ever met Mr. Collins face-to-face.

Then sometime after that, maybe a few weeks after that, which would put it sometime around the first part of

February, that's when I found—I had gotten a call from an individual who lived on old San Jose Road. This was a Mr. Wrenn. It was in regard to some type of a disagreement involving—well, it started out involving a tree that was on his property which apparently Mr. Merchant either cut down himself or had an employee of his cut down without speaking to [100] the owner.

Mr. Wrenn was calling our office because he apparently confronted Mr. Merchant about it and received what he felt were a number of threats. He had connected with me because he had met a woman in a grocery store and I believe it was Mrs. Williams.

Q. What was that complaint that he related to you?

A. Related to me that he confronted Mr. Merchant about this tree incident? The conversation got increasingly more hostile and Mr. Merchant made some reference to the fact that he shouldn't bother him because both him and his girl friend had .45's.

Q. Does that complete the review of the complaints that you received firsthand during this period as best you can remember them?

THE COURT: That's enough complaints.

MR. PENROSE: Thank you, your Honor.

Q. Did you take any action with respect to these complaints?

A. Absolutely.

Q. What was your decision on the appropriate action?

A. Well, I went back and looked at my old file to figure out exactly what the status of the case was and then went and did some legal research to try and find out what position the people had in relationship to the stay that had [101] been issued by the trial judge. Came to the conclusion that the case file stated that what was said in fact was simply the jail time and not the probation itself.

Q. And did you file any pleadings after having done that research?

A. Yes.

I noticed a motion and filed it, I think, on February 14th.

Q. Was that the motion for clarification/modification?

A. That's correct.

Q. When did that actually come to a hearing?

A. 27th of February.

Q. Wasn't there anyone present there on behalf of the defendant?

A. His attorney, Mr. Foster.

Q. Did you have occasion to say anything to Mr. Foster while the two of you were waiting for Judge Marlowe to come out on the bench?

A. Yes.

I was there first. Mr. Foster came in and made a somewhat directorial comment about the motion. I said something to the effect of, "Sam, what do you expect me to do? We're still having the same problems." I told him to tell him to cool it. The neighbors are calling lately and he's still firing the guns up there.

[102] Q. Were you present on March 3rd at the time of the search?

A. Yes, I was.

Q. Did you actually participate in the search or were you there as a legal adviser?

A. I was there as a legal adviser.

MR. PENROSE: I have nothing further.

**CROSS-EXAMINATION**

*By Mr. Stepanian:*

Q. How long were you a District Attorney prior to November 14th, 1980?

A. Eleven months.

Q. And this case that Mr. Merchant was convicted of was a misdemeanor, is that correct?

A. That's correct.

Q. You testified on your direct testimony just now that you went up to the area surrounding the Merchant property with someone, namely, Mr. Shipp, to make an inspection of some plant of some kind; is that correct?

A. Yes.

Q. You knew, didn't you, that there was a complaint from Mr. Collins and you discussed with Mr. Shipp the potential that there was drugs there, is that correct? You talked about marijuana?

A. We talked about the reason for going up there, yes.

[103] Q. What was the reason for going up there?

A. Apparently Mr. Pogue had talked to Mr. Collins and he felt there was possibly some marijuana growing in the border between Mr. Collins' house and the Merchant residence. He didn't know what it was and they wanted to know if there was someone from our office, specifically Mr. Pogue, that could go up there and could look and identify it. He couldn't go, so he arranged for Sgt. Shipp and for me to go with him.

Q. You called Mr. Shipp and you went up there to take a look at that?

A. I didn't call Sgt. Shipp, but, yes, I was to go up there with Sgt. Shipp.

Q. And you and Sgt. Shipp and someone else went?

A. It seems to me I believe it was another deputy.

Q. Do you recall me asking this question of you one other time, whether you went up there to make an inspection of a marijuana plant, and you indicated you did not know of anyone who did that?

A. No.

MR. PENROSE: May we have a page? I object. I would like to have a recitation of the page.

THE COURT: He can ask it this way.

MR. STEPANIAN: Q. Do you recall saying that?

A. Do I recall telling you that?

Q. For your purposes, I will give you the exact page.

[104] 185.

"QUESTION: Let me ask you, do you know anybody that went up there and took a plant, which purportedly was a marijuana plant, prior to your filing of the motion?"

A. Nobody took a plant.

Q. You say, "not that I know of." Was there a plant there which was a marijuana plant?

A. I didn't look.

Q. You didn't look?

A. I didn't go to make the inspection.

Q. Who went to make the inspection?

A. Sgt. Shipp and the other deputy from narcotics.

Q. You went with Sgt. Shipp?

A. I stayed with Mrs. Collins.

Q. I see.

So your testimony is that when you went up there with Mr. Shipp you did not go up there to make any inspection as far as marijuana is concerned?

A. Not myself personally.

Q. Subsequent to this hearing, did you have a conversation concerning marijuana with Mr. Shipp?

MR. PENROSE: The hearing?

MR. STEPANIAN: On April 29th.

[105] THE COURT: What's the relevancy of that?

MR. STEPANIAN: Relevancy, your Honor, is that she testified she did not go to inspect the marijuana.

THE COURT: Makes no difference anyway. There was no marijuana.

MR. STEPANIAN: Okay.

Q. How many times did you go up to that area, that is, the Collins-Wiliams-Merchant area?

A. Between now and—

Q. Between the 14th of November until March 3rd?

A. I went twice to the old San Jose Road area and several times probably to the other area.

Q. When you went up there, could you see the property from the various places that you stood, the Merchant house?

A. No. You can't see the Merchant house from the public road that leads back to the rest of the homes.

Q. How about where the Collins live?

A. If you go to a certain portion of the Collins property, you can see. That is the only place I know you can see the house, unless you are on the road in front of the Merchant house.

Q. And did you ask Officer Pogue to go up there and look at what was reported to be potentially marijuana?

A. I don't know if I asked him. He told me about the complaint. I said, "Well, can you go up there? Do you want [106] to go up there?" He said, "No, I can't." I arranged for Sgt. Shipp to.

Q. Who told you at first about that?

A. About the complaint about the marijuana?

Q. Yes.

A. Otis Pogue.

Q. You call him Pougie?

A. Otis, O-T-I-S.

Q. Fine.

Mr. Merchant did not have a probation officer?

A. As far as I know he didn't.

Q. Did you contact the probation office?

A. No.

Q. This is after you heard the complaints and you heard the conversation with Mrs. Williams, you didn't contact them, is that correct?

A. That's correct.

Q. From the 14th until the 27th, you had heard some complaints, is that correct?

A. 14th of November to the 27th of February, yes.

Q. It was a period where there was nothing happening, you say?

A. I don't recall any specifically during the holiday season, November and December.

Q. And it is a fact, is it not, that—strike that.

[107] Mr. Collins, there is a feud between those two, is that right? There's bad blood between those two people?

A. There is a long-standing dispute.

Q. You knew this?

A. Yeah.

Q. And you heard complaints from Mrs. Collins concerning Mr. Merchant, correct?

A. Correct.

Q. Did you hear complaints from Mrs. Williams concerning Mr. Merchant?

A. I believe I only spoke to her once, but I can't be sure if I spoke directly to Mrs. Williams.

Q. Did you hear any complaints from Mrs. Williams?

A. Yes.

Q. When did you speak to her?

A. That's what I said. I can't recall specifically if I spoke to Mrs. Williams. I heard complaints from her via other people.

Q. Fine.

THE COURT: Were there complaints about use of firearms?

THE WITNESS: Yes.

MR. STEPANIAN: Q. To get to the Merchant house, you go through a private road, is that correct?

A. It must be private.

[108] Q. The Collins' and Merchant's share a road, is that correct?

A. I assume that it must be the one down below, yes.

Q. Now, when you went there, you were in court when the sentencing was pronounced on Mr. Merchant, correct?

A. Yes.

Q. And needless to say, you heard and you read this transcript of what the judge said, correct?

A. Yes.

Q. After a period of time, you had occasion to want to clarify or modify what the judge's pronouncement of sentence was?

A. Yes.

Q. You were not sure, is it not true, that the stay that was granted to Mr. Merchant included all the conditions of probation?

A. At what point are you speaking of?

Q. After the 14th.

A. After November 14th?

Q. Yes.

A. After I did my legal research, I was sure of the case law.

Q. Well, why don't you tell me what you looked up in the case law.

A. I don't have the motion here. I haven't reread it. [109] If I could see the motion.

Q. Is it a fact that you wrote this motion or a legal assistant wrote the motion?

A. I did some preliminary research. I indicated the factual situation and some of the codes that I felt were applicable and gave them to a research attorney in our office. Actually, a legal clerk at that time. Asked her to write a motion and she wrote it. I reviewed it and we discussed it and I think I had her change a few things and I approved it.

Q. You went to your superior to ask a question as to his opinion as to whether or not this stay related to the conditions, correct?

A. I asked a number of people, yes.

Q. And you went and did some research to figure it out for yourself?

A. Basically.

Q. And then you went and you did some research and then you filed this motion, correct?

A. That's correct.

Q. Is it fair to say that you were asking for a clarification of the actual stay?

A. Yeah.

Q. In fact, the motion indicates in the points and authorities which you reviewed that—

May I approach the bench?

[110] THE COURT: You may.

MR. STEPANIAN: Q. On Lines 9 through 13: "The state order issued in the case, however, is not clear as to whether or not probation was stayed along with the rest of the judgment."

Is that correct?

A. Yes, that's correct.

Q. So at least from the 14th until the 27th, you felt that it wasn't clear as to whether the conditions were included in the stay of execution that was granted by the judge?

A. No, that's not correct? [*sic*]

Q. What is it then?

A. Because of the case log that I had reviewed indicated that unless the conditions and the grant of probation were specifically stayed, they were not stayed, and only the jail term was stayed.

Q. That is your understanding of the law, isn't that correct?

A. That is what I remember from the case.

Q. Which case did you remember?

A. That would be the In Re: Stallings.

Q. You advocated the position of the District Attorney's office and you are a litigant on various issues that come up, that's your job, correct?

A. Correct.

[111] Q. You represent the people and you argue against lawyers like myself, defense lawyers, all the time?

A. Defense lawyers, yes.

Q. You are an advocate, you have an opinion and you try to bolster up the best argument you can to present your position, isn't that correct?

A. That is correct.

Q. You filed this motion so that you would be able to get a clarification [of] what you believe was at least ambiguous?

THE COURT: Here is what it says on page 3, line 11. "If the court intended to stay only the remainder of the judgment and allow the probation to go into effect, the people ask that the order explicitly so state. If, on the other hand, the trial court originally intended to stay the entire judgment, the people specifically requested that the court reconsider that decision and exercise its discretion."

THE WITNESS: It was an argument. I felt that the case law was clear in my interpretation of it. But it's been my experience that nothing is clear until the judge and the county rules on it.

THE COURT: You did prepare an order for the judge to sign?

THE WITNESS: It was done orally.

[112] THE COURT: You could have presented an order to say, "I want to clarify this" and he would have signed it and you would have been home free and clear?

THE WITNESS: Right. Except we don't generally prepare orders. It's generally done on the record.

MR. STEPANIAN: Q. I am showing you then what the judge indicates as to what the result was from your hearing, is that correct?

A. Uh-huh.

Q. And that was that he reinstated—he uses that word "reinstated"—

MR. PENROSE: I object. First, it is argumentative. Secondly—

THE COURT: Sustained, sustained, sustained.

MR. STEPANIAN: I am just going to move through this quickly.

THE COURT: Thank you.

MR. STEPANIAN: Q. You wanted to clarify the stay of execution of November 14th, is that correct?

A. Yes.

Q. And you went to your superior. At that time, is it fair to say, that you weren't sure of what the effect of the stay was?

A. I just never encountered that situation, so, yeah, that would be fair.

[113] Q. And you did some research, preliminary research after being requested to do that by your superior, the District Attorney of Santa Clara County, you felt that the clarification seemed like the appropriate way to go, isn't that correct?

A. Yes, I was pretty sure of our position.

Q. Put it this way: You were solid of your position to the extent that you noticed a hearing to have a clarification modification of the sentence that the judge made on the 14th of November?

A. No, I was pretty sure that what had been—that what had been stayed was the jail sentence.

Q. I understand that. In answer to the question, after you ran across certain cases as to the extent of the stay which you expressed some confusion about prior to your research, is it fair to say that the idea of motion for clarification seemed like the appropriate way to go?

A. Yes.

Q. Now, you then did the various noticing, is that correct?

A. That's correct.

Q. And there was some irregularity as to your noticing on the ten-day rule, is that correct?

A. That's correct.

Q. And the first time you did this notice, apparently it was incorrectly done or you didn't give the correct notice, [114] correct?

A. I didn't give ten days.

Q. Then you had this hearing on the 27th?

THE COURT: You rescheduled again or did you go ahead on short notice?

THE WITNESS: I appeared in court. Mr. Foster didn't. The judge asked me did I give him ten-days notice. I hadn't. I sent him a letter that afternoon.

MR. STEPANIAN: Q. At the time you had the motion, it's a fact, is it not, that you wished to get this motion so you would be able to go up and search that residence?

A. I wished to get the motion because I wanted—yes. We wanted to search the residence.

Q. We—meaning yourself and Otis Pogue and various other policemen—discussed this motion to clarify or modify before it happened?

A. I had discussed the problem with them.

THE COURT: You were under the impresion that if the terms of probation were still on, regardless of which way it happened, that you would then have the authority under the terms and conditions of probation to search the residence?

A. I thought we had the authority then but, yes, I felt doubly certain that after the motion had been heard, assuming that the judge didn't completely contradict my belief, that we would have the right.

[115] I felt he was on probation. But either way after that hearing, I assumed that we would then have the—

THE COURT: You advised your office and the Sheriff's Department to that effect that you could go forward with the search?

A. Once I had advised them that I was bringing the motion. That I was going to go down and have it heard. When the judge granted it, I came back and relayed that to the investigator in our office. He then contacted the sheriff's office because he couldn't go. I think that got arranged on the Monday.

MR. STEPANIAN: Q. You spoke to Mr. Tanner after the 14th, correct?

A. After the 14th of—

Q. November.

A. Several times.

Q. And at the time you spoke to Mr. Tanner, you weren't sure what the effect of the stay was, correct?

THE COURT: We've been through that three times, counsel.

MR. STEPANIAN: I thought it was—all right.

THE COURT: The motion says what the position is. It says exactly that.

MR. STEPANIAN: Q. After that, that same day you went to speak to Mr. Pogue, is that correct?

[116] A. When I came back from Watsonville, I went and found Otis.

Q. And you said to him in those terms, Otis, the motion was granted?

A. Something along those lines.

Q. And he said, find, [*sic*] or good, or something of that nature, right?

A. I'm sure he did.

Q. When did you know that there was a civil warrant or civil writ of execution outstanding?

A. I knew that—I don't know. Maybe a month earlier. Did you want me to finish that?

Q. Sure.

A. One was originally issued and apparently there is some kind of timing as opposed to them. I was under the impression through information I got, I think, from the civil people in the Sheriff's department that it had expired, that it had never been served and they had to get a second one.

Q. Were you inquiring as to organizing the probation search in this writ of execution for these matters to be done at the same time? Were you attempting to correlate these two situations?

A. I wasn't overly concerned with the simple writ. However, my understanding of what the execution was is that it specifically named the guns that I anticipated that we would

[117] THE COURT: So the writ of execution did specify certain weapons?

THE WITNESS: Yes. Specified a gun collection.

MR. STEPANIAN: As far as you were concerned, possession of guns violated the terms of probation?

THE WITNESS: Precisely. Could not own guns.

Q. Did you have communications with the civil lawyer from Mr. Collins?

A. Not in that near time period, no.

Q. When was the last time you spoke with him when you say near the time period?

A. I think I had a co ple of discussions with the civil attorney. But if I remember correctly, when the misdemeanor case was either about to go to trial or somewhere around the original sentencing.

Q. Did you have any conversation with Mrs. Williams and/or Mrs. Collins about the progress of the case?

A. When?

Q. After November 14th?

A. Yes.

Q. They were interested in what was happening, is that correct?

A. Yes.

Q. During the conversation that you had about the progress of the case, was this the time that you went up [118] with Mr. Shipp?

A. I think we discussed the progress of the case with Mrs. Collins then. I also discussed it with her after the sentencing.

Q. Did you have any information when you went up there from any informant, whether it was a citizen informant or a police officer, about marijuana and/or drugs when you went up there with Mr. Shipp?

A. The first time I went up there with Sgt. Shipp?

Q. No. When you went up with Sgt. Shipp and he went to look for some plants, did you have a discussion

about plants or marijuana or drugs when you went up there?

THE COURT: You asked that before.

MR. STEPANIAN: I found the reference to it.

THE COURT: Okay.

THE WITNESS: Did I have a discussion with Sgt. Shipp about the information I had received?

MR. STEPANIAN: Q. Did you have any information from private citizens, citizen informants, police officers, concerning marijuana and/or drugs on that property prior to you going up there with Narcotic Officer Shipp?

A. How much prior?

Q. Did you have any knowledge when you went up there?

A. Other than what Pogue had told me, no.

Q. So the answer to your question is Pogue had told [119] you about narcotics or marijuana, is that correct?

A. No.

Q. Who told you?

A. Otis indicated to me that he had gotten a call from the Collins' about that marijuana plant.

Q. Fine.

Let me refer you, please, to page 210.

This is fairly important, your Honor. It is not spectacular, but I just want to get this cleared up.

Would you please refer to page 210 between 8 and 20.

A. Yes.

Q. Do you remember testifying to that, about any information that you received?

A. Yes.

Q. Well, did you receive any information concerning marijuana?

MR. PENROSE: Objection. She's just testified and answered that question.

THE COURT: There is some inconsistency.

Read it.

MR. STEPANIAN: Q. "Do you have any information from any informant concerning whether or not there was narcotics on the premises prior to going out there on the 3rd of March?

"A. No.

"Q. How about from any other police officers?

"A. No.

"Q. Private citizens including citizen informants?

"A. I had no information about narcotics.

"Q. That's marijuana and drugs, too?

"A. I had no information."

Now, you met with the police officers prior to going up to the house on the 3rd of March, correct?

A. Yeah.

Q. You received the reinstatement of probation by the judge on the 27th, is that right?

A. Yes.

Q. Do you recall what day that was?

A. Thursday or Friday. I think it was a Friday.

Q. It is a fact, is it not, that there was some manpower problem on Friday and in the course of that weekend in the Santa Clara County Sheriff's Department?

A. I don't think the manpower problem arose until the Monday. There was a homicide over the weekend. I think the body was found on Sunday night.

Q. Fine.

There was a manpower problem on Monday and Tuesday, isn't that correct?

A. Within our office, yes.

Q. And then when did the search take place?

A. The 3rd, which I assume was a Tuesday.

Q. How many police officers do you recall going up there?

A. Seven or eight, maybe.

Q. Lots of them, right?
A. Uh-huh.
Q. Who did you go with?
A. Whose car?
Q. Yes.
A. Lt. Griffin.
Q. Was there anybody else in that vehicle?
A. Probably Sgt. Shipp.
Q. You went into that residence during the course of that search, correct?
A. Correct.
Q. You had conversation with Mr. Sam Foster on the telephone prior to the search, is that right?
A. Yeah.
Q. You had conversations with Judge Marlowe also, is that correct?
A. I had one conversation with Judge Marlow.
Q. Mr. Foster indicated to you, did he not, that there was a notice that was given to David Merchant concerning the reinstatement of probation on the 27th?
[122] A. That's what he said at one point.
Q. And he was sort of excited and sort of, how would you say it, frantic on the telephone in regards to that?
MR. PENROSE: I object.
MR. STEPANIAN: Q. How would you characterize his tone?
MR. PENROSE: May I renew my objection, your Honor?
THE COURT: Overruled.
MR. STEPANIAN: Q. How?
A. Got increasingly more excited throughout the conversation.

**CROSS-EXAMINATION**

*By Ms. Roscoe:*

Q. Mrs. Bazar, do you recall examining the civil writ on, the civil writ you used as one of the bases for going into the residence on Highland, on March 3rd?

A. I remember seeing a copy of it.

Q. Did you examine it?

A. I read it.

Q. It's correct, is it not, that there was no affidavit accompanying it?

A. I don't remember.

Q. Is it not also correct that it was not seen by a magistrate authorizing entry?

[123] A. I don't remember.

THE COURT: You talking about the civil writ of execution?

MS. ROSCOE: Yes, your Honor.

Q. Isn't it a fact that the civil writ did not specify a gun collection, it just specified guns?

MR. PENROSE: Objection, your Honor. The document speaks for itself.

THE COURT: Is it a document in evidence?

MS. ROSCOE: It's our Exhibit B, your Honor.

THE COURT: What does it say?

MS. ROSCOE: I think it says guns. I have been unable to find my copy.

MR. PENROSE: Your Honor, this is not the complete writ. It is an exhibit. So I can't answer your question.

MS. ROSCOE: All right.

Q. At any rate, it is your testimony that you had no memory of ever examining the writ to ascertain whether or not it was signed by a magistrate?

THE COURT: Does the county counsel advise the sheriff on matters of execution?

A. Yes, they do.

THE COURT: They seek legal advice?

THE WITNESS: No.

MS. ROSCOE: Q. When did you first find out about [124] the writ?

[125] A. I had known of the existence of the writ, or I had been told of the existence of the writ, for maybe a month prior.

Q. Did you discuss it with Mrs. Collins?

A. I don't believe I ever discussed it directly with her, no.

Q. When you were up at her house the day that you went up to examine the marijuana plant, what was the nature of your conversation?

A. Marijuana, the problem with the gunshots going off in the area.

Q. She said she heard them?

A. Frequently.

I asked her if there was any particular time of day. She specified during the day as well as at night.

Q. Did she ever say that she saw anybody with the gun?

A. She told me that she had seen Mr. Merchant with the gun in the past.

Q. Did she say when in the past?

MR. STEPANIAN: I would object on behalf of Mr. Merchant. I am representing him. I feel that that question is outside the scope.

THE COURT: She's cross-examining.

MR. STEPANIAN: It is my client. I would move that [125] answer be stricken.

MR. PENROSE: I don't think because Mr. Stepanian—

THE COURT: Overruled.

MS. ROSCOE: Q. Did you go up to the Collins' house or in the area of the Highland premises?

MR. PENROSE: I object. There is a question on the record, we haven't answered.

THE WITNESS: I don't remember what the question was.

MS. ROSCOE: I will withdraw the question.

Q. Did you go up with officer Pogue to investigate sign?

A. That was one time I went up there.

Q. Was that the first time in the middle of January?

A. No. It was prior to the sentencing.

Q. Then when did you go up there to investigate marijuana?

A. That was around the middle of January.

Q. And two times to San Jose Road?

THE COURT: That's what she said.

THE WITNESS: I believe it was two, yes.

MS. ROSCOE: Q. When you were at the Highland house on March 3rd, did you assist with the search warrant?

THE COURT: Which search warrant are you talking about?

[126] MS. ROSCOE: The telephone search warrant dated March 3rd.

THE WITNESS: I was the one who contacted the district attorney's office and spoke to John Hawkins.

MS. ROSCOE: Q. Do you know what time you called in?

A. I thought I got ahold of him first probably between 1:30 and 2:00.

Q. Did you talk to any magistrate other than Judge Marlowe?

A. I don't believe I ever talked directly to Judge Kessel, no.

Q. You did talk to Judge Marlowe?

A. When I returned his call from the Merchant home.

Q. In your discussion with Judge Marlowe, did you discuss or mention the civil writ?

A. I don't remember. I don't think so.

Q. Do you recall whether or not he was aware there was a civil writ?

A. I didn't know if he was or not.

Q. Did you discuss a civil writ with Sam Foster?

MR. PENROSE: I object to the relevancy of this. Lack of relevance.

THE COURT: Sustained.

MS. ROSCOE: Thank you.

[127] MR. PENROSE: Your Honor, I have a very brief redirect.

May I show counsel a document before I profer it to the witness?

THE COURT: Yes.

MR. PENROSE: May I approach the witness?

THE COURT: You may.

MR. PENROSE: May the record reflect I am handing the witness two documents marked respectfully G-2-A and G-2-B.

**REDIRECT EXAMINATION**

*By Mr. Penrose:*

Q. Mrs. Bazar, what are those documents now that you have looked at them?

A. This is—

Q. This being G-2-A.

A. Page G-2-B is the form the clerks office fills out. It is a confinement form. It has to do with the sentence and when and if they are to start any sentence.

MR. STEPANIAN: I would ask that that be stricken as the document speaks for itself.

THE COURT: I don't have a copy.

MR. STEPANIAN: I think those are court records.

MS. ROSCOE: I think it is our exhibit H.

THE COURT: Looks like an IRS form to me. Okay. This date was November 14th. People of the state [128] of California vs. David Merchant. Number of case 417PC and 417BPC.

MR. PENROSE: Those are the charges.

THE COURT: Appeal on second count filed in open court. Attorney Foster present. Okay.

MR. PENROSE: Your Honor, for the record, I think what you are—

THE COURT: 18 months. 12 months suspended. Stay of execution granted until 12-13-80. Okay.

What's your question?

MR. PENROSE: My question concerning G-2-B, which the witness now has, is is that the formal sentencing document from the November 14th sentencing.

MR. STEPANIAN: I would object to that.

THE COURT: I will take judicial notice it is.

MR. STEPANIAN: That it is, your Honor?

THE COURT: Yes.

MS. ROSCOE: I think the court fills this form out after every hearing to indicate what happened.

THE COURT: It is a court record.

MR. PENROSE: I think the record would reflect this is a certified copy with the seal of the court.

THE COURT: This next one is G-2-A, which is entitled "conditions of probation."

"Imposition of sentence suspended for a period [129] three years. Probation granted under the supervision of probation office for three years. Confinement to the county jail—six months. Stay of execution granted to 12-13-80. Other conditions of probation: not to possess any firearms during period of probation."

Okay.

MR. PENROSE: Your Honor, I think the record should reflect that G-2-A also is a certified copy from the clerk of the court.

Q. Mrs. Bazar, with respect to G-2-A, the document that has the signature of the defendant at the bottom, or what purports to be the signature of the defendant, were you in court to see whether or not that document was signed?

A. Yes.

Q. Did you see the defendant sign it?

A. Yes.

Q. Can you tell us at what stage of the proceedings it was when the defendant signed it? When I say at what stage, at what stage was it with respect to the discussion on the record concerning the stay and–

A. It was at the very end. This is always the last thing. The judge is beginning to go off the bench. It was right at the point when I realized that I hadn't asked for a [130] formal order to have the weapons destroyed. The clerk, if I remember it correctly, had just handed him the form to sign and I asked for a formal order for the weapons to be destroyed. It distracted Mr. Merchant for a minute, because I believe he said something as to them being destroyed.

Q. Then he signed them?

A. Then he signed it and handed it back to the clerk.

Q. Is that after the colloquy on the record about the stay?

A. Yes.

MR. PENROSE: Nothing further.

**RECROSS-EXAMINATION**

**By Mr. Stepanian:**

Q. When you were talking in terms of destroying weapons–

May I approach the witness?

THE COURT: Yes.

MR. STEPANIAN: Q. Who wrote this order for weapons to be destroyed?

A. I would assume that the clerk wrote that.

Q. This document is what the clerk of the court looks at? That's G-2-B.

A. The clerk does both of them.

Q. This is in the possession of the clerk?

A. They both are up until the point where she hands [131] it to him to be signed.

Q. But this is in the court file, though, isn't that correct? These are both in the court file?

A. They're both in the court file.

Q. This one is not signed by the—

A. This one remains, as far as I know, with the court file. A copy of this is given to the defendant and the original remains in the file.

Q. You had communications with Mrs. Williams and also Mrs. Collins, isn't that correct?

A. Yes.

Q. They're friends, is that right, is it fair to say?

A. I don't know.

Q. Did you ever talk to them together?

A. No.

Q. Did you talk to them at any time before the sentencing?

A. Yes.

Q. Mrs. Collins before the sentencing?

A. Yes.

Q. Mrs. Williams before the sentencing?

A. I believe so.

Q. They made some complaints concerning weapons, gunshots?

A. Prior to sentencing?

[132] Q. Yes.

A. Yeah.

Q. Did you personally receive information about Mr. Merchant being seen with a weapon or did you receive that from some other police officer?

A. I had at various times received it both from police officers and from individuals who lived in the area.

Q. I am talking about this—

A. Specifically what I testified to.

Q. Yes. Who did you receive that information from?

A. Mrs. Collins.

Q. When was that, please?

A. She told me about it when we went up there to look at the marijuana plant.

Q. There was no marijuana plant?

A. No.

Q. Who was present when she said that to you?

A. She and I.

Q. And when was that date, please?

A. Some time in the middle of January.

Q. When did she say she saw this weapon or this gun in Mr. Merchant's hand? When did she say that?

A. I don't think she gave me an exact date.

MR. STEPANIAN: I'd ask that that be stricken as no foundation.

[133] THE COURT: Okay, denied.

Anything else?

MR. PENROSE: Nothing further.

Your honor, as I understand it, counsel may wish to recall Mrs. Bazar and, therefore, we are going to take the next witness out of order to lay the foundation.

THE COURT: All right.

ROBERT WILLIAM SHIPP,

Called as a witness on behalf of the government, being first duly sworn, testified as follows:

THE CLERK: State your full name and spell your last name.

THE WITNESS: My name is Robert William Shipp, S-H-I-P-P.

THE COURT: Mr. Stepanian, you have had the officer on the stand before?

MR. STEPANIAN: Yes.

THE COURT: How would it speed up the process?

MR. STEPANIAN: This was the longest officer. This officer will take until 4 o'clock.

THE COURT: Did you hear my suggestion? My suggestion is that Mr. Penrose make an offer of proof. Then you accept it or cross-examine him on it.

MR. STEPANIAN: Let's do it. He has testified before. [134] THE COURT: Is that all right with you, Mr. Penrose?

MR. PENROSE: Yes, your honor.

Your Honor, Sgt. Shipp will testify that he was a member of the search team, that he entered the house after a period of time, awaiting the telephone calls to be completed. The search began. Mr. Merchant said to him that all the guns are in two locations. That Sgt. Shipp went upstairs with—one of the locations upstairs. He went upstairs with Deputy Ruiz.

THE COURT: Did Mr. Merchant say upstairs?

MR. PENROSE: He said two locations.

THE COURT: Do you recall where he said they were?

THE WITNESS: He didn't mention any locations. He just said two places.

MR. PENROSE: Miss Marohn accompanied Sgt. Shipp and Deputy Ruiz upstairs and she said all the second floor guns are in that room. She indicated a room adjacent to the bedroom where they could see there were a large number of guns propped up against the wall and along the wall. As Sgt. Shipp was proceeding toward these guns that he was pointed to, he looked over to the side by the bedroom, and specifically about the headstand of the bed, and saw a .45 automatic, and he mentioned that, and Mrs. Marohn said, oh, I forgot that one.

He then went over toward that gun and saw a second [135] handgun on the floor close by the area where the .45 was originally seen, and he picked that up and motioned to Deputy Ruiz, and Deputy Ruiz then opened the top drawer of the nightstand and there was a second revolver in that drawer.

At some point in this unfolding sequence of events, Mr. Merchant came upstairs into the bedroom looking for his spectacles, and he found his spectacles by that bed were those guns were found and took them and went elsewhere.

Mrs. Marohn asked for some money from a drawer that

was in the bedstand that the second revolver had been retrieved from and she was allowed to take that money. Sgt. Shipp then called the civil deputies upstairs to begin to catalog the guns for the purpose of the levy. And they came up and were put basically in command of those guns.

The search proceeded then without taking into account Mrs. Marohn's statements that all the second floor guns were in one pile. They felt they had to ascertain that for themselves.

They in the course of that found a large quantity of cash in a dresser drawer in that bedroom.

THE COURT: Same testimony by Officer Kirkland, right?

MR. PENROSE: I believe that largely overlaps.

Sgt. Shipp would also testify to the description of the barn built on the slope. There were two levels.

[136] Sgt. Shipp would then testify that he came back downstairs and was thinking to himself that he had basically approached close to the completion of the search and then he noticed under the stairwell covering the stairway that was closed. And it looked to him like a storage area. And he said to himself, "I wonder what would be in there. Looks like a storage area." Following my notes here. Sgt. Shipp then said there has to be a storage area under these stairs. Ms. Marohn who was nearby at that point, said there are no weapons in there. That is just a storage area.

Sgt. Shipp says, "I believe you, Cleo, but I have to look, that is my job." Mrs. Marohn repeated it was just a storage area.

Sgt. Shipp then moved around looking for an opening in this area and came across a door that was held on by bent nails. He straightened out one of the nails and then saw a staircase leading not down to a storage area but to a basement.

He had a flashlight. He began panning with the flashlight and saw what appeared to be chemical containers.

Specifically ether containers.

I believe just before he was panning, or as he was panning, Miss Bazar called down there, "Can Cleo leave?" A second later there was this panning and he said, "No, hold up Cleo."

Sgt. Shipp would also testify to the the time when [137] the suitcase full of qualudes was discovered and opened. And he would testify that his occurred close to the end of the initial search before they froze the place, and it definitely occurred after the bedside guns had been discovered and after they were finding guns in small containers.

THE COURT: After they found the basement storage or before?

MR. PENROSE: I don't know the answer.

THE COURT: Do you recall?

THE WITNESS: Yes, sir. It was during my examination of the basement that the qualudes were found upstairs. When I returned upstairs to advise Lt. Kirkland, they were bringing down the qualudes.

THE COURT: So you didn't find the qualudes yourself?

THE WITNESS: No, I did not.

MR. PENROSE: That basically covers it.

THE COURT: Okay. Mr. Stepanian.

**CROSS-EXAMINATION**

**By Mr. Stepanian:**

Q. You had an occasion to go up and around the Merchant residence and Collins residence about two or three weeks prior to March 3rd, is that correct?

A. That's correct.

Q. And you had been up there with Mrs. Patty Bazar?

[138] A. That is correct.

Q. You went up with her and some other officer?

A. That is correct.

Q. When you went up there, she had given you information that she had learned from the Collins' that there was some potential marijuana plants there, is that correct?

A. She advised me that she had received a complaint from them and she would like me to come up and confirm it.

THE COURT: You are with the sheriff's office?

THE WITNESS: Yes. Narcotics section.

MR. STEPANIAN: Q. So you went up there and there was no marijuana growing outside the area that was pointed out?

A. That is true.

Q. Okay. Going down to the entrance into the basement area or storage area.

A. Basement.

Q. There was some foam rubber or some sort of mattress material in front of the door that you had to open to go in, do you recall that?

A. You mean up against the door itself?

Q. Yes.

A. I do not recall. I could see the door easy. I did not have to pull anything away to see that there was a doorway. I don't know—the whole place was with junk. I had to climb over rugs and lots of stuff.

[139] Q. There's machines. There's big machines in that place, right?

A. Right.

Q. There's lathe, huge lathes?

A. Yes.

Q. There is an antique lathe as big and as tall as this courtroom, is that correct?

A. Probably as long as that desk area and probably as tall as it is long.

Q. It is a huge commercial lathe?

A. Yes.
Q. There is big electric saws, lots of tools?
A. Correct.
Q. Engine parts?
A. Correct.
Q. Ratchets, big sort of cases full of tools?
A. Correct.
Q. On the walls, all over the place?
A. True.
Q. There is all kinds of machinery in various process of repair and disrepair, is that correct?
A. There is all kinds of stuff all over.
Q. Big machines, little machines, that kind of thing?
A. Yes.
Q. The house is sort of in semi-poor condition?
[140] A. Poor condition.
Q. Refurbishing. There were certain places that were in the process of being repaired, is that correct?
A. I don't know if they're being repaired or not. They were not in finished condition.
Q. Now, that doors that you went down to, you brought your flashlight, there were bent nails on the wall?
A. On one side.
Q. You had to bend those nails to get in?
A. You would just take the bent nail and twist it sideways and it would come down.
Q. How many of them did you do?
A. Specifically, I remember the top one. I don't remember if there was one on the bottom or not.
Q. Now, we are going to the barn area.
Did you have occasion to go into the barn?
A. Which date?
Q. On March 3rd.
A. I had occasion to go in both areas.
Q. There is an upstairs and a lower level?
A. Yes.

Q. On the upstairs level there was motorcycles?

A. In the upstairs part of the barn there was, yes, a broken down motorcycle.

Q. How many of them?

[142] Q. Did you open the door?

A. Had a lock on it.

Q. Which portion of the barn are you talking about?

A. Talking about strictly the upper part.

Q. Pardon me?

A. Talking about stricly the upper part. Second level.

Q. There is kind of a rickety ramp, is that correct?

A. Yes.

Q. That goes over a little gully?

A. That's true.

Q. And into the upper portion of the barn?

A. That's correct.

Q. You say there was a padlock on the upper part?

A. Yes, Sir.

Q. How did you get it open?

A. I cut if off. I was at least there when it was cut.

Q. By that time, Mr. Merchant had left?

A. Mr. Merchant had been arrested and transported to jail.

Q. Do you recall approximately what time a chemist came to the place—criminologist?

A. Some time around 12 or 1 o'clock, to the best of my knowledge.

[143] Q. Would it refresh your recollection to say it was 2:55?

A. Criminologist?

Q. Yes.

A. If that's the case, I don't know. I thought it was closer to 1 o'clock.

**CROSS-EXAMINATION**

*By Ms. Roscoe:*

Q. Sgt. Shipp, when you went down to the basement, that is, when you observed containers of ether—

A. Yes?

Q. On that observation, you called upstairs and had Cleo Marohn stopped from leaving the premises?

A. Yes.

Q. And did you do that because you saw the ether?

A. Yes.

Q. And that made you suspicious of her?

A. She was what I believed to be a co-habitant of the residence and my observations of what was downstairs led me to believe possibly there was evidence to believe that they were in the process of making illegal drugs.

Q. So you detained her on that basis?

A. Yes, Ma'am, I did.

Q. Just prior to your going down there, or when you were part way down there, somebody asked you for permission [144] for her to leave because she had a doctor's appointment?

A. That's right.

Q. Do you know who it was who asked your permission?

A. I am not sure. I believe it was Miss Patty Bazar.

Q. At that point, you said okay?

A. I advised we had no reason not to let her go.

Q. How long did you stay down in the basement?

A. I would say less than three minutes.

Q. You mean you just flashlighted the containers and then went back up?

A. I walked about three-quarters of the way down. I was still on the stairway. With my flashlight, I panned the basement area. The containers were labeled ether. Some of them were.

Q. How big an area is that?

A. Maybe almost the size of this room. Maybe three-quarters the size of this room. Maybe two-thirds.

THE COURT: This room is what, 20 by 40?

THE WITNESS: Probably from the end of this desk and out to that wall and almost as wide.

THE COURT: 30 by 30?

MR. PENROSE: I was going to say 30 by 30.

MS. ROSCOE: Q. At any rate, from the staircase that you were on you could shine your light into the room and see containers labeled ether, is that your testimony?

[145] A. Yes.

Q. And then you turned around and you went back upstairs?

A. Yes.

Q. And then you went back down there later on?

A. Oh, yes.

Also, if I may clarify, when I went down that stair I might have stepped down and looked to make sure what it was. I didn't totally spend all my time on the steps. I wasn't very long. As soon as I saw it, I came back upstairs.

Q. Before you pushed the bent nails aside to gain entry down to the stairway, you mentioned to Cleo that that looks like a storage area and she said to you there are no weapons down there, is that correct?

A. Best of my recollection, yes.

Q. And they said it was just a storage area?

A. Yes.

Q. And did you find any weapons down there?

A. No.

Q. Did you ask her how to undo the barricade so you could get down?

A. No.

Q. But you did observe that there was something down there and she said yes, it was a storage area?

MR. PENROSE: Objection. Asked and answered.

[146] THE COURT: Sustained.

MS. ROSCOE: Q. When you went upstairs, would it be your testimony, according to the offer of proof, that Cleo stated all the guns on the second floor were in one room?

A. Probably more correctly would be that they're all in there. That's all the guns. I don't think she made reference to the second floor. Just the fact all the guns are in there.

THE COURT: You were on the second floor and she pointed to a room?

THE WITNESS: Yes.

MS. ROSCOE: Q. And in that room there were 50 or more rifles?

A. Approximately. Somewhere around 50 rifles, and other weapons.

Q. And handguns as well?

A. Yes.

Q. So the bulk of the weapons were in that room?

A. Yes.

Q. And then later you found one on the floor next to the bed?

A. I found two there.

Q. And you pointed that out to her?

A. I said, "What about this?" she said, "I forget. He keeps a gun there" or something to the effect.

[147] MS. ROSCOE: Thank you.

**REDIRECT EXAMINATION**

*By Mr. Penrose:*

Q. In response to a question that Judge Williams asked you, you said you cut the lock off.

A. I believe there present [*sic*] at the cutting of the lock.

Q. Was it that cutting of the lock on the barn before or after the approval of the telephone warrant?

A. It was after the warrant.

Q. Do you know of anybody who searched the barn before the telephone warrant?

A. Second floor?

Q. Right.

A. No one searched the second floor before the warrant.

Q. What do you know concerning a search of the first floor?

A. Most likely, people were in and out of the bottom part. They could have been.

Q. You say most likely. Do you have any knowledge?

A. I have no knowledge. I just know it wasn't a restricted area and we were looking for a tank at the time.

MR. STEPANIAN: I would ask that that be stricken.

THE COURT: Overruled.

MR. PENROSE: It is part of the background of the case.

[148] Q. You were looking for a particular vehicle?

A. Yes.

MR. PENROSE: Thank you, I have nothing further.

THE COURT: That's all. Thank you.

MR. PENROSE: That does complete the government's case.

MR. STEPANIAN: Our witness, your Honor, in this matter is Kathy Kelley.

THE COURT: Miss Kathy Kelley, would you come forward, please.

* * * * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CRUZ

---

No. 296

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF/RESPONDENT,

*v.*

WILLIAM DAVIDSON MERCHANT III,
DEFENDANT/APPELLANT.

---

**OPINION**

This is an appeal from a judgment imposed after revocation of probation.

The following facts are undisputed:

1. On November 14, 1980, after a jury had found defendant guilty of violations of Sections 417 and 417(b) of the Penal Code, the trial court placed him on three years' formal probation on condition, among others, that he serve six months in the county jail for violation of Section 417 and twelve months, suspended, for violation of Section 417(b). At that point in the proceedings, defense counsel filed a Notice of Appeal whereupon the judge stated "the sentence [!] will be stayed pending your appeal". Defendant then signed probation terms.

2. The Probation Department did not assign an officer to this case.

3. On February 11, 1981, the People brought a Motion for Clarification and/or Modification of Stay of Judgment. The Petition recited that:

> "The stay order issued in this case . . . is not clear as to whether or not the probation was stayed along with the rest of the judgment.

4. At the hearing upon the motion, defendant was not present but was represented by counsel. The court stated:

> "The court will grant the motion for clarification. Defendant will be reinstated on the terms of probation."

5. Defense counsel did not inform defendant of the hearing or its outcome.

6. On March 3, 1981, a probation search of defendant's residence was conducted and guns, whose possession constituted a violation of probation, were found. The trial court thereafter revoked probation and sentenced defendant to 18 months in jail. This appeal followed.

If the District Attorney and the Probation Department were uncertain as to whether only the jail sentence or the entire judgment was stayed pending appeal, the defendant cannot be faulted for being similarly confused. Due process and elementary considerations of fairness preclude the revocation of probation and imposition of a jail sentence unless the defendant had theretofore being unequivocally apprised of his probation status. In view of our holding on this point, we need not address other issued raised by defendant.

We do not in any respect disagree with the decision of the United States District Court for the Northern District of California in CR No. 81-0109 SW(SJ), dated October 28, 1981, which held that the trial court intended to impose probation effective November 14, 1980 and that, in any event, the probation search was lawful.

The order revoking probation is reversed and the trial court is directed to readmit the defendant to probation.

Dated: Nov. 17, 1981.

[signature illegible]

Brauer, P.J.

I concur.

[signature illegible]

May, J.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. CR-81-109-SW (SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

WILLIAM DAVIDSON MERCHANT, CLEO MAROHN,
DEFENDANTS.

**DECLARATION OF CRISTINA C. ARGUEDAS IN SUPPORT OF MOTION FOR RECONSIDERATION**

I, Cristina C. Arguedas do declare:

1. I represent Defendant Marohn in the above entitled matter.

2. I have discussed the probation procedures with Robert Hawsley of the Santa Cruz Probation Department, and I have reviewed the papers filed in connection with Defendant Merchant's Municipal Court probation revocation in Santa Cruz. In doing so I received the following information:

a. When a Municipal Court Judge sentences a defendant to a term of probation, the Court sends a notice to the Probation Department informing them of that fact.

b. Upon receipt of such notice, the Probation Department assigns an officer to supervise the probationer.

c. If the probationer fails to report to the probation office, the probation department petitions the court to revoke probation in the case.

d. David Merchant never reported to probation after the November 14, 1980 sentencing hearing, and the Probation Department never petitioned for a revocation of probation prior to the March 3, 1981 search.

e. In the Merchant case, the Santa Cruz Probation Department filed a supplemental report to the court dated April 21, 1981 stating that "Probation supervision was not provided pending the appeal outcome."

The foregoing is true and correct to the best of my knowledge.

Dated: September 3, 1982

Respectfully submitted,

/s/ CRISTINA C. ARGUEDAS

Cristina C. Arguedas

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

---

No. CR-81-109-SW (SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

WILLIAM D. MERCHANT, AND CLEO L. MAROHN,
DEFENDANTS.

---

**STIPULATION OF FACTS BETWEEN DEFENDANT MERCHANT AND UNITED STATES**

---

WILLIAM DAVIDSON MERCHANT, also known as William Davidson Merchant, III, defendant herein, after having discussed the matter with his attorney and being satisfied with the legal advice received, hereby agrees to submit the issue of the appropriate verdict on Count I in this matter to the Court on the basis of the fact stipulation set forth below. Defendant William D. Merchant further agrees to waive the following rights in submitting the case by fact stipulation:

1. The defendant waives his right to public trial by a jury of twelve persons selected in accordance with the applicable procedures of the United States District Court for the Northern District of California;

2. The defendant waives his right to require that any adverse verdict be unanimous among the jurors;

3. The defendant waives his right to confront and cross-examine the government witnesses;

4. The defendant waives his right to call witnesses on his own behalf;

5. The defendant represents that no promises have been made to him in exchange for the above captioned waivers except that after a verdict is rendered in this matter the United States will move to dismiss Counts II and III against him. Defendant specifically represents that he makes these waivers freely and voluntarily and after consultation with his attorney.

6. Defendant further stipulates that his true name is William Davidson Merchant, III, and that he is the same person named in the above captioned indictment.

7. Defendant further stipulates that the statements set forth below could be established as fact at his trial and that the Court is authorized by him to accept these statements as facts established beyond a reasonable doubt:

a. On March 3, 1981, officials from the Santa Cruz County Sheriff's office began a search of the residence of defendant Merchant (and the barn adjacent thereto) at 25977 Highland Way, Los Gatos, California.

b. All physical evidence referred to below was directly derived from this March 3, 1981, search. This search was made under the circumstances described in suppression hearings and probation violation hearings held before U.S. District Judge Spencer Williams and California Municipal Court Judge John A. Marlo, respectively, and is further described in exhibits attached to pleadings filed by the parties in this case in support of and in opposition to the suppression motions.

c. Defendant Merchant was present at 25977 Highland Way, Los Gatos, California (hereinafter "Highland"), prior to and at the beginning of the March 3, 1981, search. At all relevant times, the Highland property was owned by defendant Merchant's parents, and he was the authorized occupant of those premises.

d. All chemicals, chemical containers, laboratory equipment and documents relevant to Count I referred to below were provided through competent chains of custody

to Drug Enforcement Administration chemist Lionel Tucker, who participated in the examinations and analyses set forth in the report of April 15, 1981, which is attached hereto as Exhibit a [*sic*] "A".

e. Lionel Tucker, upon being called by the government, would testify to qualifications which properly would satisfy the Court that he was competent to render expert opinions and conclusions as to the purposes to which the documents, chemicals and equipment had been gathered at the Highland property. Mr. Tucker would testify that in his opinion these materials were gathered at Highland Way for the purpose set forth at page five of this report, to wit: to produce "phencyclidine (PCP) and its immediate precursor, 1—piperdinocyclohexane carbonitrile (PCC)." Mr. Tucker's testimony would completely cover the statements set forth in the attached report, which is incorporated into this stipulation by reference. The apparatus diagrams, chemical procedure outlines and invoices which are attachments to and part of Exhibit "A" were seized during the search which commenced on March 3, 1981.

f. With respect to the address of Blue Frog Enterprises, Box A, Holy City, California, which appears on certain invoices in Exhibit "A", a representative of the California Department of Motor Vehicles would testify that William Davidson Merchant, III, gave that same address on about August 14, 1979, as part of his application for renewal of his California driver's license.

g. A representative of the San Jose Police Department would testify that defendant Merchant was issued a citation on approximately March 9, 1978. This representative would further testify that on that date Mr. Merchant gave his address as Box A, Holy City, California.

h. United States currency in the amount of at least $313,205 was seized on the premises at Highland Way in the search which commenced on March 3, 1981. Attached

hereto as Exhibit "B", is the report of the Santa Cruz Sheriff's Office itemizing the materials seized in the search which commenced on March 3, 1981. Representatives of the Sheriff's office would testify that each of these items was so seized in the locations specified.

8. Count I of the Indictment is amended to read "Schedule III" where it presently reads "Schedule II".

DATED: March 17, 1983

/s/ WILLIAM DAVIDSON MERCHANT, III
William Davidson Merchant, III
*Defendant*

/s/ JOHN F. PENROSE
John F. Penrose
*Assistant United States Attorney*

/s/ PENELOPE S. COOPER
Penelope M. Cooper
*Counsel for Defendant Merchant*

APPROVED:

/s/ SPENCER WILLIAMS
Spencer Williams
*United States District Judge*

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

---

NO. CR-81-0109-SW (SJ)

Violation of Title 21 U.S.C. Sections 841(a)(1) and 841(b)(1)(B)(5)—Manufacturing of Phencyclidine.

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

WILLIAM D. MERCHANT, DEFENDANT.

---

**JUDGMENT AND PROBATION COMMITMENT ORDER**

---

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause of the contrary was shown or appeared to the court the court adjudged the defendant guilty as charged and convicted as ordered. The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years; that a special period of parole of seven (7) years is imposed; that the defendant shall pay a fine in the sum of twenty-five thousand dollars ($25,000.00) to the use of the United States of America.

IT IS FURTHER ORDERED that the original Indictment and all remaining counts of the Superseding Indictment as to defendant herein be and are hereby dismissed.

IT IS FURTHER ORDERED that execution of sentence herein is hereby stayed until further order of the Court.

/s/ SPENCER WILLIAMS

May 20, 1983

# In the Supreme Court of the United States

No. 85-1672

UNITED STATES, PETITIONER

*v.*

WILLIAM D. MERCHANT

ORDER ALLOWING CERTIORARI. Filed June 30, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20527

(5)

Supreme Court, U.S.
FILED
AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1672

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM D. MERCHANT

---

*ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

CHARLES FRIED
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

WILLIAM C. BRYSON
*Deputy Solicitor General*

PAUL J. LARKIN, JR.
*Assistant to the Solicitor General*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

H3 P

## QUESTIONS PRESENTED

1. Whether due process requires personal notice to a defendant, rather than notice to his attorney, of a scheduled court hearing.

2. Whether the Fourth Amendment exclusionary rule requires the suppression of evidence obtained by law enforcement officers acting in reliance on a facially valid judgment of probation, where the judgment is subsequently held invalid on the ground that it was entered at a proceeding that was procedurally defective.

## PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Cleo L. Marohn was named in the indictment, but she was dismissed from the case by the district court and did not appear in the court of appeals.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

---

No. 85-1672

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM D. MERCHANT

---

*ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 760 F.2d 963. The order of the district court (Pet. App. 15a-18a) is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 20a) was entered on May 14, 1985, and a petition for rehearing was denied on January 13, 1986 (Pet. App. 19a). On March 6, 1986, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 12, 1986. The petition was filed on April 11, 1986, and was granted on June 30, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fourteenth Amendment provides, in pertinent part:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

## STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Northern District of California, respondent was convicted of manufacturing phencyclidine (PCP), in violation of 21 U.S.C. 841(a)(1). Respondent was sentenced to ten years' imprisonment, was fined $25,000, and was given a special parole term of seven years (J.A. 208). The court of appeals reversed (Pet. App. 1a-14a).

1. In 1980, respondent was convicted in California state court on two misdemeanor counts of brandishing a firearm. Pet. App. 2a, 16a. The state court placed respondent on three years' probation. On one count, the court sentenced respondent to one year's imprisonment, with the entire term suspended in favor of probation; on the other count, the court ordered respondent to serve six months in jail (J.A. 40). As additional conditions of probation, the state court forbade respondent from possessing firearms during his probationary term and required him to "submit his

person, residence or vehicle to search and seizure at any time of day or night by a peace officer with or without a warrant" (J.A. 40; *id.* at 33, 34).

Immediately after the court had pronounced sentence, a colloquy ensued among the court, respondent, and respondent's trial counsel. Respondent protested that the six-month period of incarceration would be financially burdensome because, as he put it, "what this means to me is everything I own. * * * I have $1,500 a month tractor payments which I cannot make in jail" (J.A. 40). In response to that plea, the state court agreed to "give you a stay of execution to allow you to enter any work furlough program. I don't want anyone to lose their job" (*ibid.*). Respondent's attorney then stated that he would appeal the conviction on the second count, on which respondent had been ordered incarcerated, and he asked if he could file a notice of appeal at that time (*ibid.*; see also *id.* at 109). The court replied that the sentence would be stayed pending the appeal (*id.* at 40). At the conclusion of the sentencing proceeding, respondent signed a form acknowledging that he had read and understood the search and firearms conditions of probation (*id.* at 33, 185-186).[1]

2. Two months later, in January 1981, the state prosecutor received several reports from respondent's neighbors that they had heard the sound of gunfire coming from respondent's property; one neighbor also reported that respondent had said that he had a .45

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[1] A copy of the state court judgment, executed by the clerk and filed on November 14, 1980, contains a handwritten notation at the bottom that reads (J.A. 34): "Confinement date to be cont. pending appeal." The district court in this case took judicial notice of that document (*id.* at 185).

caliber handgun (J.A. 145-146, 148-149, 163-165).[2] Believing that respondent may have violated his probation by possessing firearms, the prosecutor examined the file on respondent's case and researched the effect of the stay of respondent's sentence on the conditions of his probation (*id.* at 54-56, 165-166, 170-171). Although she concluded that only the six-month period of detention had been stayed, and not the three-year probationary period or its conditions (*id.* at 165, 172, 174), the prosecutor did not immediately order a search of respondent's residence. Rather, on February 11 she filed and served on respondent's counsel a motion (*id.* at 44-48) seeking clarification of the court's stay order, so as to eliminate any potential confusion about whether the conditions of respondent's probation were in effect (*id.* at 56-57, 65, 174). After that motion was filed, respondent's counsel had several telephone conversations with his client, but he did not advise respondent about the hearing (*id.* at 98-99, 105-107, 112-113).[3]

3. The prosecutor's motion came on for a hearing on February 27 (Pet. App. 22a). Shortly before the hearing began, the prosecutor told respondent's counsel about the reports of gunfire from respondent's

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[2] The prosecutor also received a complaint that marijuana plants were growing on the border between respondent's property and a neighbor's, but the complaint turned out to be unfounded (J.A. 61-63, 82, 147, 154-155, 163, 169, 177-179, 191-192).

[3] Respondent's counsel apparently believed that his client's presence was unnecessary because the hearing would not affect his bail status or his appeal on the count on which he had received the jail term (J.A. 103-106).

property (J.A. 166).[4] At the outset of the proceeding, the state court noted that respondent's counsel was present, but respondent was not (Pet. App. 22a). Respondent's counsel did not object to conducting the proceeding in respondent's absence, and on the merits he consented to the prosecutor's motion, agreeing that it was "well taken" (*ibid.*). The court then stated that "[the] Court will grant the motion for clarification. Defendant will be reinstated on the terms of probation" (*ibid.*). The court made clear that "[t]he entire probation order that he signed," including the provision forbidding respondent from possessing firearms, was in effect, although respondent was not yet required to report for confinement (*ibid.*). Respondent's counsel subsequently wrote respondent a letter to inform him about the proceeding and the fact that the conditions of his probation were in effect (J.A. 99, 100-102, 108, 109, 110).[5] Respondent, however, did not receive the letter until a number of days after the February 27 hearing (*id.* at 99-101).

4. Four days after the hearing, on March 3, several police officers, the state prosecutor, and a civil

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[4] The state prosecutor testified at the suppression hearing that respondent's attorney

> came in and made a somewhat directorial comment about the motion. I said something to the effect of, "Sam, what do you expect me to do? We're still having the same problems." I told him to tell [respondent] to cool it. The neighbors are calling lately and he's still firing the guns up there.

J.A. 166; see also *id.* at 85-86.

[5] The letter stated, in part, that " '[b]asically the District Attorney wanted to maintain the probationary order as active on the first count. * * * The court ordered that the probation remain effective pending the appeal' " (J.A. 111).

process server went to respondent's house to conduct a search for firearms and to execute a civil judgment against respondent (J.A. 114-115). After the officers stated their purpose, respondent became excited and asked to speak with his lawyer (*id.* at 115-116). Accompanied by a police officer, respondent was allowed to call his attorney, who told the prosecutor that respondent had not been notified of the state court's February 27 order (*id.* at 71-73, 101-102, 110-111, 116-117, 180). The prosecutor decided that the search should be conducted nonetheless. While at respondent's residence, the prosecutor also spoke briefly with the state trial judge (*id.* at 73-75, 180). The judge said that he had received "a very hysterical phone call from [respondent's attorney]" (*id.* at 74), and that he contacted the prosecutor to learn the reason for the attorney's concern. After being informed by the prosecutor that respondent's residence was being searched, the state judge replied that he had called the prosecutor simply because respondent's counsel was upset. He added that his call should not be treated as either approval or disapproval of the search (*id.* at 74-75).

During the ensuing search, the officers discovered approximately 80 firearms (J.A. 129). In addition, the officers inadvertently discovered approximately three pounds of methaqualone tablets (quaaludes), a large quantity of chemicals and laboratory equipment that could be used to manufacture PCP, and approximately $360,000 in cash (Pet. App. 3a, 16a-17a; J.A. 118-121, 129-131). At that point, the officers arrested respondent and halted their search in order to obtain a telephonic search warrant for respondent's residence (*id.* at 121-122, 127). After obtaining the warrant,

the officers discovered additional narcotics and laboratory equipment (Pet. App. 3a, 17a).

5. Based on the evidence seized during the search of respondent's house, a federal grand jury indicted respondent on three narcotics charges (J.A. 30-31). Before trial, respondent moved to suppress the evidence seized from his residence. He argued, inter alia, that the search could not be justified under the consent-to-search provision of his probation order, since he had not been notified of the state court's February 27 hearing or order.

The district court denied the motion for two independent reasons (Pet. App. 15a-18a). First, the court held that the search was lawful because respondent was on probation at the time the search was conducted (*id.* at 17a). The court found that the state court had stayed only that portion of respondent's sentence ordering his incarceration and had not stayed the imposition of probation (*ibid.*). Second, the court held that, in any event, the evidence seized during the search of respondent's house should not be suppressed (*id.* at 18a). The court found that "the law enforcement personnel involved and, for that matter, [respondent's] attorney * * * all held a good faith belief that they had the authority to make a warrantless search of [respondent's] residence based on the [state] trial court's ruling on the motion for clarification or modification' (*ibid.*). Concluding that the exclusionary rule should not apply where evidence " 'is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken[,] belief that they are authorized,' " the court denied respondent's suppression motion (*ibid.*, quoting *United States* v. *Williams*, 622

F.2d 830, 840 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981).[6]

6. The court of appeals reversed the district court and ordered the evidence suppressed (Pet. App. 1a-14a). At the outset, the court held that respondent had not been placed on probation when he was sentenced on November 14, because the state court had stayed respondent's entire sentence and not merely the portion requiring his incarceration (*id.* at 5a-6a). The court of appeals then ruled that the state court's February 27, 1981, order was invalid because respondent was not given personal notice of the proceeding (*id.* at 6a-10a). Characterizing the February 27 proceeding as "neither a revocation nor an extension of probation, but * * * what amounted to an initial imposition of probation" (*id.* at 8a), the court held that the consent-to-search provision of the probation order constituted a burden on respondent's liberty, requiring that he be given personal notice of the proceeding (*id.* at 8a-9a). "Notice to and the presence of [respondent's] attorney does not suffice" for due process purposes, the court held (*id.* at 10a (footnote omitted)). Because respondent had not been personally notified of the February 27 hearing, the court held that the order the state court entered on

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[6] The municipal court judge who had originally sentenced respondent later revoked his probation because of the discovery of firearms in his residence. The Superior Court Appellate Division reversed that order, on the ground that respondent was unaware that the conditions of his probation were in effect. *People* v. *Merchant*, No. 296 (Cal. Super. Ct. Nov. 17, 1981), slip op. 2 (J.A. 194-196). In so ruling, however, the court expressly stated that "[w]e do not in any respect disagree with the decision of the [district court in this case], which held that * * * the probation search was lawful." Slip op. 3 (J.A. 195).

that day was "a nullity" (*ibid.*). Accordingly, the court concluded, the search on March 3 could not be upheld on the strength of the consent-to-search clause in the state court's probation order (*ibid.*).

The court of appeals then turned to the question whether the evidence seized from respondent's house was nevertheless admissible under *United States* v. *Leon*, 468 U.S. 897 (1984). Pet. App. 10a-14a. The court held that the evidence was not admissible because, in the court's view, "none of the law enforcement officers reasonably could have believed that the search related to the interests of effective probation supervision" (*id.* at 11a-12a).

The court acknowledged that the prosecutor decided to conduct the search because of the reports of gunfire from respondent's property, which indicated that respondent had violated the condition of his probation that he not possess firearms during his probationary period (Pet. App. 12a). However, the court noted that at the time of the search respondent had not yet been assigned a probation officer and had not received any counseling or supervision. The court also noted that the prosecutor did not inform either the probation department or the state court of the reports of gunfire, and that she did not tell the state court at the February 27 hearing about her earlier conversations with local law enforcement officers regarding her desire to search respondent's residence (*ibid.*). Relying on these facts, the court concluded that "the search was a subterfuge for conducting a criminal investigation" and was not a "genuine attempt to enforce probation" (*id.* at 12a-13a). Concluding that the officers' behavior "is the type of law enforcement conduct that ought to be deterred," the court held that *Leon* was inapplicable and that the

evidence seized from respondent's house should be suppressed (*id.* at 13a).

## INTRODUCTION AND SUMMARY OF ARGUMENT

I. The court of appeals held that the Due Process Clause requires personal notice to a defendant in a criminal case of a scheduled judicial proceeding, even though the defendant's attorney has been notified of the time and nature of the proceeding. That ruling is plainly in error. It departs from well-settled principles of representative litigation; it is inconsistent with the Federal Rules of Civil and Criminal Procedure and with this Court's decision in *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962); and it imposes on the prosecutor or the court the burden of duplicating steps that should properly be left to defense counsel. Notice to a defendant's attorney of the pendency of any proceeding that may occur during the course of a criminal prosecution is sufficient to satisfy any due process requirement that the defendant himself be notified of the proceeding.

II. The Fourth Amendment itself does not authorize the suppression of evidence. Rather, evidence obtained in violation of the Fourth Amendment may be suppressed only by operation of the judicially-created exclusionary rule. As this Court has noted, the question whether to apply the exclusionary rule in a particular situation turns on weighing the benefits of deterring illegal police conduct against the costs of withholding reliable evidence from the finder of fact. *United States* v. *Leon*, 468 U.S. 897, 907 (1984); *id.* at 908-913; see also *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1042-1050 (1984); *United States V. Calandra*, 414 U.S. 338, 349-352 (1974); *Stone* v. *Powell*, 428

U.S. 465, 486-495 (1976); *United States* v. *Janis*, 428 U.S. 433, 448-454 (1976).

After applying that balancing test, this Court concluded in *United States* v. *Leon* that the benefits from suppressing evidence obtained in reasonable reliance on a search warrant are "marginal or nonexistent" and cannot justify "the substantial costs of exclusion." 468 U.S. at 922. The Court therefore held that evidence obtained by law enforcement officers who relied on a facially valid search warrant may not be excluded at trial, even if the warrant is subsequently found to be defective, as long as the officers' reliance on the warrant was "objectively reasonable." *Ibid.* Accord, *Massachusetts* v. *Sheppard*, 468 U.S. 981, 987-988 (1984).

This case is closely analogous to *Leon*. The officers who searched respondent's home relied on a facially valid consent-to-search clause that a court had made a part of a judgment of probation. Although the federal court of appeals later held that the state court judgment of probation was invalid on procedural grounds (grounds we disagree with), the officers' reliance on the consent-to-search clause was as reasonable as the reliance of the officers in *Leon* on the facially valid warrant in that case. Moreover, the probation search in this case was conducted in a reasonable manner and in accordance with well-settled principles of state law. The circumstances leading up to the search show that the search was a bona fide probation search and not a pretext for a criminal investigation, as the court of appeals concluded. For that reason, the principles of *Leon* dictate that the evidence obtained in the search not be suppressed, even if the probation judgment was invalid because respondent was not personally notified of the February 27 hearing.

## ARGUMENT

### I. THE DUE PROCESS CLAUSE DOES NOT REQUIRE PERSONAL NOTICE TO A DEFENDANT, RATHER THAN HIS ATTORNEY, OF A SCHEDULED COURT PROCEEDING

1. The Due Process Clause generally requires personal service of the pleading that commences a civil action, because that manner of service ensures that a person will be notified of the pendency of the suit and will have the opportunity to "choose for himself whether to appear or default, acquiesce or contest" a claim against him (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). See, *e.g.*, *Greene* v. *Lindsey*, 456 U.S. 444, 449 (1982). For much the same reason, the Sixth Amendment requires that a defendant in a criminal case "be informed of the nature and cause of the accusation." See, *e.g.*, *In re Oliver*, 333 U.S. 257, 273 (1948). The Federal Rules of Civil and Criminal Procedure implement these principles by requiring that the defendant be served with the pleading, such as the complaint, summons, or indictment, that commences a civil suit or a criminal prosecution. Fed. R. Civ. P. 4(d); Fed. R. Crim. P. 4 (d)(3), 9(c), 10; 18 U.S.C. 3432.[7]

Once a party has retained counsel, due process does not require that the party be personally served with subsequent pleadings or be given personal notice of subsequent proceedings. On the contrary, it is

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[7] Even with respect to the original charging document in a criminal case, the courts have not insisted on personal service on the defendant, as long as the defendant receives notice of the charges. See *United States* v. *Clark*, 407 F.2d 1336, 1337 (4th Cir. 1969); cf. *Segurola* v. *United States*, 275 U.S. 106, 109-110 (1927).

well settled that in our system of representative litigation pleadings may be served on counsel rather than on a party, even when a motion contemplates or calls for a hearing. In fact, the Federal Rules of Criminal and Civil Procedure expressly *require* that all subsequent pleadings be served on counsel rather than on a party. Fed. R. Crim. P. 49(b); Fed. R. Civ. P. 5(b).[8] It is likewise clear that notice to a party's counsel of the pendency of a proceeding is equivalent to notice to the party himself. As this Court has explained, once a party voluntarily chooses an attorney as his representative in a case, he "is considered to have 'notice of all facts, notice of which can be charged upon [his] attorney.'" *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1879)). The "facts" that may properly be charged to a party include the dates and nature of scheduled hearings. See 370 U.S. at 633-635.[9]

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[8] See 4 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1145, at 583 (1969) (footnote omitted) ("[t]he requirement of service on the attorney [in Fed. R. Civ. P. 5(b)] is to be followed literally; service upon a party represented by an attorney does not comply with the rule"); 3A C. Wright, *Federal Practice and Procedure: Criminal* § 822, at 235 (1982) (Fed. R. Crim. P. 49(b) should be construed in the same manner as Fed. R. Civ. P. 5(b)); see also *United States* v. *Lujan*, 589 F.2d 436, 438 (9th Cir. 1978), cert. denied, 442 U.S. 919 (1979).

Indeed, the legal profession generally frowns on direct communication between an attorney and an opposing party. See *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 31 n.52 (Stevens, J., dissenting); A BA Model Rules of Professional Conduct 4.2 (1983); ABA Model Code of Professional Responsibility DR 7-104(A)(1) (1980).

[9] The courts of appeals have reiterated and applied this principle in a variety of circumstances. See, *e.g.*, *Townsend* v.

The principle that a party is deemed to have notice of all facts known by his attorney rests on concerns of practicality and efficiency, as well as the determination that in an adversary system an attorney can and should be trusted with the responsibility of providing his client with the information necessary to a just defense or the prosecution of his cause. It is, in addition, fully consistent with due process principles. While notice of the pendency of a proceeding is essential to the opportunity to be heard in either a civil or a criminal case (*Mullane*, 339 U.S. at 314; *In re Oliver*, 333 U.S. at 273), due process demands only that notice be "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Mullane*, 339 U.S. at 314; see *Greene*, 456 U.S. at 449-451). Once a party has retained an attorney, it is entirely reasonable to conclude that his counsel will notify him of any upcoming proceedings, as well as assure that he is present if his attendance is necessary, because one of an attorney's responsibilities is to keep his client abreast of the progress of his case. *Link*, 370 U.S. at 633.[10] Notice to an attorney of a scheduled court

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*Gray Line Bus Co.*, 767 F.2d 11, 19 (1st Cir. 1985) (counsel's failure to appear at a status conference and to object to the substitution of a new judge is charged to the client); *Loyd* v. *Loyd*, 731 F.2d 393, 400 (7th Cir. 1984) (notice to counsel of scheduled probate hearing is deemed to be notice to his client); *United States* v. *Everett*, 700 F.2d 900, 902 n.5 (3d Cir. 1983) (notice to defense counsel that the government has taken an appeal and has filed its brief is deemed to be notice to the defendant).

[10] See also ABA Model Code of Professional Responsibility EC 7-8 (1980); *id.* at EC 9-2 ("a lawyer should fully and promptly inform his client of material developments in the

proceeding can therefore properly be deemed to be notice to the party he represents.

There is no reason to adopt a different rule for criminal cases. Defense counsel in a criminal case, like his counterpart in the civil system, has the duty to inform his client of the progress of the case. See *Jones* v. *Barnes*, 463 U.S. 745, 751-754 & n.6 (1983); 1 ABA Standards For Criminal Justice: The Defense Function 4-3.8 (2d ed. 1980) ("[t]he lawyer has a duty to keep the client informed of the developments in the case and the progress of preparing the defense"). It is reasonable to rely on defense counsel in a criminal case to inform the defendant of scheduled proceedings, just as it is reasonable to rely on an attorney in a civil case to notify his client of such hearings. Accordingly, the rule set forth in *Link* v. *Wabash R.R.*, *supra*, should apply to criminal and civil cases alike.[11]

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matters being handled for the client"); ABA Model Rules of Professional Conduct 1.4(a) ("[a] lawyer shall keep a client reasonably informed about the status of a matter").

To be sure, respondent's state court counsel did not notify respondent of the February 27 hearing. But that failure does not alter the appropriate due process analysis. See, *e.g.*, *Walters* v. *National Ass'n of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 15 (citation omitted) ("the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions' ").

[11] Of course, if a defendant in a criminal case is seriously prejudiced by conduct of his attorney falling well below the standard for professionally competent assistance, he can seek relief on the grounds of ineffective assistance of counsel. See *Strickland* v. *Washington*, 466 U.S. 668 (1984).

2. Even if the question were not answered by this Court's decision in *Link* v. *Wabash R.R.*, *supra*, the rule adopted by the court of appeals has nothing to recommend it. Requiring the defendant to be personally notified of every hearing in a criminal case will not appreciably increase the likelihood that the defendant will be present at those proceedings at which his presence is essential but which he would otherwise not attend. First, defense counsel ordinarily can be relied upon to inform the defendant of the proceedings and the need for him to attend. Second, court rules typically require the defendant's presence at criminal trials and other critical proceedings in a criminal case, absent a waiver by the defendant. See, *e.g.*, Fed. R. Crim. P. 43. Only in the rare case in which the court rules do not require the defendant's presence, and in which defense counsel fails to apprise the defendant of a scheduled proceeding, would the requirement of personal notice to the defendant have any value.

At the same time, a requirement of personal notice would impose a needless burden on the criminal trial process. It would require either the prosecutor or the court to advise the defendant of each development in the litigation. Neither alternative would work satisfactorily. For the prosecutor to notify the defendant of upcoming hearings would offend the general principle that counsel should not contact an opposing party directly. In addition, that system would invite claims that the prosecutor has gone beyond the limits of notification and has interfered with the attorney-client relationship. For the court to bear the burden of notification would require already busy trial courts to engage in the burdensome formality of sending a defendant personal notice of every scheduled proceed-

ing. In either case, unless personal service rather than the mail were used, the notice requirement would invite litigation over whether and when the defendant in fact received notice of the proceeding. The notice requirement would therefore lead to needless makework in the overwhelming majority of cases, without substantially contributing to the purposes for which the Due Process Clause ordinarily requires notice.

Respondent argues (Br. in Opp. 17-18) that a personal notice requirement would not prove burdensome, since trial courts could always ask defense counsel whether he has informed his client of the proceeding and could postpone a hearing when defense counsel has failed to do so. That procedure, however, would be cumbersome. It would require cancellation of any hearing at which defense counsel said he had not notified the defendant, even if the defendant's presence was unnecessary Respondent's proposed procedure would also lead to unnecessary litigation, often brought as a collateral challenge to a conviction, over whether defense counsel had in fact told his client about the hearing, even when defense counsel said that he had done so. There is no apparent benefit from encouraging such litigation.

It is also unnecessary to have a personal notice requirement in order to protect a defendant's right to be present at critical points in a criminal case. That right can be protected on its own terms by court rule and constitutional principles. See *United States* v. *Gagnon*, No. 84-690 (Mar. 18, 1985), slip op. 4; *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). Thus, a defendant's right to be present will be ensured by due process principles in those cases, unlike this one, in which " 'a fair and just hearing would be thwarted by his absence.' " *United States* v. *Gagnon*, slip op.

4 (quoting *Snyder* v. *Massachusetts*, 297 U.S. 97, 107-108 (1934)).[12]

3. No decision of this Court supports the personal notice requirement imposed by the court of appeals in this case. The court of appeals relied (Pet. App. 9a) on *Faretta* v. *California*, 422 U.S. 806 (1975), but that decision is totally inapposite. *Faretta* held that a defendant has the right to represent himself at trial; in so ruling, the Court stated that, under the Sixth Amendment, "[i]t is the accused, not counsel, who must be 'informed of the nature and cause of the accusation'" (422 U.S. at 819). That principle, however, applies only to the notification of the charges against the defendant. It does not suggest that a defendant who is represented by counsel must be afforded personal service of all pleadings filed by a

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[12] The court of appeals left open the question whether the February 27 hearing was invalid because respondent was not present (Pet. App. 10a n.5), and there is no need for this Court to resolve it. We submit, however, that the hearing was not invalid for that reason. The February 27 hearing involved a purely legal question as to which respondent's participation could not have served any conceivable purpose. See *Price* v. *Johnston*, 334 U.S. 266, 285 (1948) (defendant's presence unnecessary at appellate proceedings); *United States* v. *Graves*, 669 F.2d 964, 972-973 (5th Cir. 1982) (defendant's presence unnecessary at conference on jury instructions). The absence of any need for respondent to be present was particularly clear in light of the fact that the legal issue presented at the hearing was undisputed; respondent's counsel agreed at the hearing that the prosecutor's position in her motion was "well taken" (Pet. App. 22a). The failure of respondent's counsel to object to going forward in his absence provides a further indication that respondent's presence was not essential to the fairness of the proceedings on February 27. See *United States* v. *Gagnon*, slip op. 5.

prosecutor during the course of a criminal proceeding or personal notice of all hearings in the case.

Respondent relies primarily on *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), and argues (Br. in Opp. 16-17) that he was entitled to be personally notified of the February 27 hearing, because the order entered by the trial judge at that proceeding affected his Fourth Amendment rights. *Gagnon*, however, does not support a personal notice requirement. That decision held that a probationer was entitled to notice of both a preliminary and a final probation revocation hearing (411 U.S. at 782), but it did not suggest that notice to the probationer's attorney of those proceedings would be insufficient to satisfy due process requirements. Indeed, the primary question in *Gagnon* was whether due process required that counsel be appointed for an indigent probationer at a probation revocation hearing. *Id.* at 783-791. Since one of the responsibilities of an attorney is to inform his client of upcoming proceedings, notice to a party's attorney of any such proceeding is properly deemed to be notice to the party, as this Court held in *Link* v. *Wabash R.R.*, *supra*. Thus, under this Court's precedents, the notice to respondent's counsel was sufficient to apprise respondent of the February 27 hearing. The order entered at the conclusion of that hearing was therefore not invalid because of any infirmity in the manner in which notice of the hearing was provided.

## II. THE EXCLUSIONARY RULE DOES NOT REQUIRE THE SUPPRESSION OF EVIDENCE OBTAINED BY LAW ENFORCEMENT OFFICERS IN REASONABLE RELIANCE ON A CONSENT-TO-SEARCH CLAUSE IN A JUDGMENT OF PROBATION

The Fourth Amendment protects legitimate expectations of privacy and in property, but does not itself authorize the suppression of wrongfully seized evi-

dence. Evidence obtained in violation of the Fourth Amendment may be suppressed only by operation of the exclusionary rule, explicitly created by the courts as an instrument for protecting Fourth Amendment values. *United States* v. *Leon*, 468 U.S. 897, 906 (1984); *United States* v. *Calandra*, 414 U.S. 338, 349-352 (1974); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In *United States* v. *Leon* this Court concluded that the benefits from suppressing evidence obtained in reasonable reliance on a search warrant are "marginal or nonexistent" and cannot justify "the substantial costs of exclusion" (468 U.S. at 922). The Court therefore held that evidence obtained by law enforcement officers who relied on a facially valid search warrant may not be excluded at trial, even if the warrant is subsequently found to be defective, as long as the officers' reliance on the warrant was "objectively reasonable" (*ibid.*). See also *Massachusetts* v. *Sheppard*, 468 U.S. 981, 987-988 (1984).

This case fits well within the principles of *Leon*. It was entirely reasonable for the officers who searched respondent's home to rely on the facially valid consent-to-search clause that the trial court had imposed as part of respondent's sentence. Moreover, the officers executed the search in conformity with settled state law regarding probation searches, and they did so in a good faith effort to determine whether respondent had violated the terms of his probation by possessing a firearm. The principles of *Leon* and *Sheppard* compel the conclusion that the evidence seized from respondent's residence should not be suppressed, even if the February 27 hearing was procedurally defective.

### A. The Officers' Reliance On The Consent-To-Search Clause In Respondent's Probation Order Was Objectively Reasonable

1. Under well-settled California law, a "consent-to-search" clause that is imposed as a condition of probation may authorize a probation officer or a policeman to search a probationer's residence. In 1971, the Califonria Supreme Court expressly upheld the imposition of a condition of probation identical to respondent's (*People* v. *Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), cert. denied, 405 U.S. 1016 (1972)), and the state courts have upheld similar consent-to-search clauses ever since. See *People* v. *Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 1265-1271, 224 Cal. Rptr. 112, 127-133 (1986).[13] The California courts have reasoned that requiring a probationer to consent to a search of his residence is valid under the Fourth Amendment, because a consent-to-search condition is a reasonable price for a defendant to pay in exchange for the greater liberty that comes with probation, rather than incarceration. *People* v. *Mason*, 5 Cal. 3d at 765-766, 488 P.2d at 633-634, 97 Cal. Rptr. at 305-306; see also *People* v. *Myers*, 6 Cal. 3d 811, 819, 494 P.2d 684, 689, 100 Cal. Rptr. 612, 617 (1972). Probation searches satisfy the Fourth

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[13] Search conditions like the one in this case are commonly entered in judgments of probation in California. See *People* v. *Bremmer*, 30 Cal. App. 3d 1058, 1062 n.1, 106 Cal. Rptr. 797, 800 n.1 (1973) ("[t]he wording of the condition [similar to the one imposed in this case] appears in printed forms used for recording judgments in Los Angeles and Orange counties"). Typically, the search condition is imposed on probationers who have engaged in crimes involving possession of contraband or stolen property. See *People* v. *Constancio*, 42 Cal. App. 3d 533, 540, 116 Cal. Rptr. 910, 913 (1974).

Amendment, the California courts have held, as long as they are reasonable: there must be reasonable grounds for the search, the search must be related to the legitimate objectives of probation, and the search must be executed in a reasonable manner. See, *e.g.*, *United States* v. *Johnson*, 722 F.2d 525, 527-528 (9th Cir. 1983) (construing California law); *People* v. *Guerrero*, 85 Cal. App. 3d 572, 581-582, 149 Cal. Rptr. 558, 560 (1978); *People* v. *Bremmer*, 30 Cal. App. 3d 1058, 1065-1607, 106 Cal. Rptr. 797, 802-803 (1973).[14]

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[14] Other courts have also upheld the imposition of search conditions on probationers or parolees on similar grounds. See, *e.g.*, *Owens* v. *Kelley*, 681 F.2d 1362, 1366-1368 (11th Cir. 1982); *State* v. *Perbix*, 331 N.W.2d 14, 21 (N.D. 1983); *Seim* v. *State*, 590 P.2d 1152, 1156 (Nev. 1979); *State* v. *Montgomery*, 115 Ariz. 583, 584-585, 566 P.2d 1329, 1330-1331 (1977). A number of courts have upheld warrantless searches of probationers or parolees when there is a reasonable suspicion that the probationer or parolee has violated a condition of his release. See, *e.g.*, *United States* v. *Scott*, 678 F.2d 32, 35 (5th Cir. 1982) (parolee); *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 263, 265-266 (9th Cir. 1975) (en banc) (probationer); *Latta* v. *Fitzharris*, 521 F.2d 246 (9th Cir.) (en banc), cert. denied, 423 U.S. 897 (1975); *United States ex rel. Santos* v. *New York State Bd. of Parole*, 441 F.2d 1216, 1217-1219 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972) (parolee); *State* v. *Fields*, 686 P.2d 1379, 1387-1390 (Hawaii 1984) (probationer); *State* v. *Velasquez*, 672 P.2d 1254, 1260-1261 (Utah 1983) (parolee); *People* v. *Huntley*, 43 N.Y.2d 175, 371 N.E.2d 794, 401 N.Y.S.2d 31 (1977) (parolee); *People* v. *Anderson*, 189 Colo. 34, 37-38, 536 P.2d 302, 305 (1975) (parolee).

A minority of courts have ruled that a probation or parole officer may not search the home of a probationer or parolee without a warrant supported by probable cause. *United States* v. *Rea*, 678 F.2d 382, 386 (2d Cir. 1982); *United States* v. *Workman*, 585 F.2d 1205, 1207 (4th Cir. 1978); *State* v.

The principles of *United States* v. *Leon* are fully applicable to a case such as this one, involving a search conducted pursuant to a court's judgment of probation. In *Leon*, the Court explained that the exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates" (468 U.S. at 916), and that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations" (*id.* at 921). It follows from *Leon* that no legitimate purpose served by the exclusionary rule is advanced by suppressing evidence obtained in good faith reliance on a facially valid court order authorizing a probation search.

The Court in *Leon* noted that the Fourth Amendment expressed a "strong preference for warrants" (468 U.S. at 914), and concluded that a "good faith" test, applied in the warrant context, would serve the purpose of encouraging law enforcement officers to resort to the warrant process. But the goal of encouraging police officers to use the warrant process was not the central basis for the decision in *Leon*. Rather, the Court based its decision principally on the proposition that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity" (*id.* at 919). "Where the officer's conduct is objectively reason-

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*Fogarty*, 187 Mont. 393, 413-416, 610 P.2d 140, 152-153 (1980) (consent-to-search clause overbroad); *State* v. *Cullison*, 173 N.W.2d 533 (Iowa), cert. denied, 398 U.S. 938 (1970); see also *Tamez* v. *State*, 534 S.W.2d 686, 692-693 (Tex. Crim. App. 1976) (holding consent-to-search clause overbroad, but noting that probationers have a lesser expectation of privacy than ordinary citizens). The federal courts of appeals in *Rea* and *Workman*, however, did not have before them a consent-to-search clause like the one at issue here.

able," the Court held, " 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.' " *Id.* at 919-920 (citation omitted). See also *Brown* v. *Illinois*, 422 U.S. 590, 611-612 (1975) (Powell, J., concurring); *United States* v. *Peltier*, 422 U.S. 531, 539, 542 (1975); *Michigan* v. *Tucker*, 417 U.S. 433, 417 (1974) ("[w]here the official action was pursued in complete good faith, * * * the deterrence rationale loses much of its force").

Even if *Leon* is viewed as based principally on the policies favoring resort to warrants, those policies are in large measure applicable to this case as well. Rather than conducting a search solely on their own initiative, the officers in this case relied on a search authorization granted by a court and limited to a particular individual. The officers were therefore not making the determination to invade respondent's privacy entirely on their own; instead, they were relying on the judgment of a court that a search of respondent's house was permissible if grounds should arise to indicate that respondent had violated the terms of his probation.

For that reason, the analysis in this case should not materially differ from the analysis employed in *Leon*. Just as a search or an arrest warrant can authorize a police officer to enter and search the residence of a probationer (see, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980)), the California consent-to-search clause authorizes any peace officer to enter and search a probationer's residence. In both cases, it is the responsibility of a judicial officer, who

is not a member of "the law enforcement team," to determine whether an intrusion on a person's privacy is justified. *Leon*, 468 U.S. at 917. In both cases, a law enforcement officer could not reasonably be expected to question the judicial officer's judgment that the order is legally sound. *Id.* at 920-921. In both cases, "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment" (*id.* at 916). And in both cases, once the order authorizing a search is entered, there is " 'literally nothing more the [probation officer or] policeman [could] do in seeking to comply with the law' " (*id.* at 921 (citation omitted)), except to execute the search in a reasonable fashion. In short, as a California court of appeals has explained, a challenge to a search conducted pursuant to the terms of a probation order "is analogous to that arising from a claim that a search warrant has been issued by a magistrate on less than probable cause or an arrest warrant on less than reasonable cause. Our present concern is with judicial power rather than police power." *People* v. *Bremmer*, 30 Cal. App. 3d 1058, 1062-1063, 106 Cal. Rptr. 797, 800 (1973). See *People* v. *Barbarick*, 168 Cal. App. 3d 731, 740, 214 Cal. Rptr. 322, 328 (1985) (admitting evidence seized in good faith reliance on a consent-to-search condition in a release-on-recognizance order that was later held invalid); cf. *Gluck* v. *United States*, 771 F.2d 750, 757-758 (3d Cir. 1985) (upholding a summons issued in good faith reliance on a Fed. R. Crim. P. 6(e) disclosure order later held to be defective).[15]

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[15] See also *People* v. *Washington*, 131 Cal. App. 3d 434, 438-440, 186 Cal. Rptr. 3, 5-6 (1982) (refusing to apply exclusionary rule when officers seized evidence in reasonable reli-

2. *Leon* and *Sheppard* require that a police officer's reliance on a search warrant must be objectively reasonable in order for the good faith exception to be applicable. 468 U.S. at 922; 468 U.S. at 988. That requirement is easily satisfied in this case. Here, as in *Sheppard*, the prosecutor and the officers who carried out the search "took every step that could reasonably be expected of them" to ensure that the search of respondent's residence was lawful. 468 U.S. at 989.

The prosecutor clearly did not act precipitously in deciding to undertake a search of respondent's residence. Once she learned that respondent may have violated the conditions of his probation by possessing a firearm, she did not immediately order a search of respondent's premises. Rather, she sought to ensure that the firearms and search conditions of his probation were in effect. She examined respondent's file, researched the applicable law, and discussed the matter with her superior (J.A. 165, 171). After doing so, she concluded that the probation conditions had not been stayed by the order of the municipal court staying the execution of respondent's period of confinement. Her judgment on that issue was entirely reasonable. The court's order was certainly susceptible to that construction, and the record in respondent's case included a notation that only his in-

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ance on probation order containing a consent-to-search clause even though, unbeknownst to the officers and probationer, the order had expired by operation of law); *People* v. *Tellez*, 128 Cal. App. 3d 876, 880-881, 180 Cal. Rptr. 579, 581-582 (1982) (refusing to suppress evidence seized in reasonable reliance on parole order containing consent-to-search clause even though it was later determined that the order had been unlawfully extended in reliance on a new state law).

carceration had been stayed (see J.A. 34).[16] That alone would be sufficient to demonstrate that the prosecutor acted reasonably. But there is more.

Against the possibility that her interpretation of the effect of the court's stay of confinement was incorrect, the prosecutor took the additional step of attempting to clarify respondent's status with the court. She filed a motion to clarify respondent's status (J.A. 44-47), she served the motion on respondent's counsel (*id.* at 48), and she told respondent's attorney why she wanted to ensure that the firearms and search conditions of respondent's probation were in effect (*id.* at 166). Respondent's counsel appeared at the hearing, and he did not object to going forward in respondent's absence (Pet. App. 22a). The state court judge noted that respondent was not present, but neither the judge nor defense counsel suggested that respondent's absence created a problem (*ibid.*). The officers who conducted the search were then advised that the municipal court had ruled that respondent was on probation (J.A. 66, 115, 123, 175).

Even if the February 27 hearing were invalid because respondent was not personally notified of the hearing in advance, neither the prosecutor nor the searching officers could reasonably be charged with

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[16] Under state law, a judgment of probation is not stayed absent an express statement by the trial court to that effect. See Cal. Penal Code §§ 1243 and 1467 (West 1982). The California Court of Appeals concluded in *In re Kennick*, 128 Cal. App. 3d 959, 962, 180 Cal. Rptr. 731, 732 (1982), that a trial court's stay of its judgment stayed the entire judgment unless the court specified otherwise. That decision, however, was handed down after the search in this case. Therefore, even if that decision was contrary to the prosecutor's conclusion, the prosecutor could not be charged with knowledge of that case.

anticipating that the probation judgment would be invalidated on that novel ground. Even if the municipal court was responsible for some procedural defect in the February 27 hearing, the prosecutor and police officers should no more be penalized for that error than the officers in *Massachusetts* v. *Sheppard*, *supra*, should have been penalized for the technical defect in the search warrant form in that case. Moreover, the state municipal court and the district court in this case (Pet. App. 17a) held that respondent was on probation at the time his residence was searched, which is powerful evidence that the officers' actions were objectively reasonable. *Leon*, 468 U.S. at 926 (applying good faith exception when the affidavit accompanying the search warrant application "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause"); cf. *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 5, 8-9.

Respondent suggests (Br. in Opp. 23-24) that the officers acted unreasonably, because they should have called off the search when respondent, through his lawyer, told the prosecutor that he was unaware of the February 27 hearing or the order entered at that proceeding. Even assuming that this would ever be an invalidating circumstance, a contention with which we disagree, respondent's suggestion is unavailing, for several reasons. First, it would require the officers to accept at face value respondent's assertion that he did not know about the February 27 hearing. Second, it would require the officers to conclude that, as a legal matter, respondent was not on probation until the February 27 order was entered. And third, it would require the officers to conclude that respondent's asserted lack of awareness of the February 27

hearing was sufficient to invalidate the order entered by the court on that day.[17]

To insist on such an extraordinary level of legal acumen and trust in respondent's uncorroborated protestations is asking too much of the searching team, as it assembled outside respondent's home. The far more reasonable course for the searching team at that point was to rely on the state court's facially valid probation judgment, just as it was reasonable for the officers in *Massachusetts* v. *Sheppard*, *supra*, to rely on the search warrant at issue in that case. Indeed, the state court judge spoke with the prosecutor during the search, after hearing from respondent's attorney. If it had been clear that the course of action followed by the searching party was unreasonable, the judge presumably could have said so. The judge, however, expressly stated that he would not approve or disapprove of the search (J.A. 74-75). Accordingly, neither respondent's protests nor those of his attorney made the officers' reliance on the state court's order unreasonable.

**B. The Search Of Respondent's Home Was Not A "Subterfuge" For A Criminal Investigation**

The court of appeals held that the good faith exception to the exclusionary rule was inapplicable because the search was "a subterfuge for conducting a criminal investigation" (Pet. App. 12a). In so ruling, the court of appeals relied (*ibid.*) on earlier Ninth Cir-

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[17] The suggestion that the searching party should have retreated when respondent and his attorney protested the search is even more unrealistic in light of the fact that before respondent telephoned his attorney, one of the officers saw what appeared to be an automatic weapon inside respondent's home (J.A. 116).

cuit decisions in which that court had stated that a probation search is valid only if there is a reasonable factual predicate for the search. *United States* v. *Johnson*, 722 F.2d at 527-528; cf. *United States* v. *Jarrad*, 754 F.2d 1451, 1452-1454 (1985), cert. denied, No. 84-6659 (Oct. 7, 1985) (parole search); *Latta* v. *Fitzharris*, 521 F.2d 246, 251-252 (en banc) (same), cert. denied, 423 U.S. 897 (1975). The court's conclusion, however, was both legally and factually erroneous.

As a legal matter, the court of appeals ignored the fact that the California law enforcement officers were acting not only in accordance with the terms of a facially valid probation order, but also consistently with well-settled California law regarding the execution of probation searches under consent-to-search conditions. The California courts have long held that consent-to-search clauses can validly serve as the basis for probation searches, and that a probation officer need not be a party to the search. *E.g.*, *People* v. *Mason*, *supra*; *People* v. *Palmquist*, 123 Cal. App. 3d 1, 7-8, 176 Cal. Rptr. 173, 177 (1981). Moreover, the reports of gunfire on respondent's property clearly satisfied the requirement under state law that there be a reasonable basis to believe that the probationer is violating the terms of his probation. See *People* v. *Britton*, 56 Cal. App. 3d 689, 697, 202 Cal. Rptr. 882, 887 (1984).

There is also no factual basis for the court's conclusion that the officers used the search as a subterfuge for a criminal investigation. The undisputed evidence showed that the sole purpose for the search was to determine whether respondent possessed a firearm in violation of the conditions of his probation (J.A. 82-83, 115, 116, 129, 145-146, 149, 152-153,

162-165). Neither the court of appeals nor respondent has identified the crime that was supposedly the true object of the search, and the record does not suggest what that offense was.[18] It was not a crime for respondent to own a firearm, because he had not been convicted of a felony. Pages 2-3, *supra;* see 18 U.S.C. App. 1202(a)(1) (making it a crime for a convicted felon to possess a firearm). It was also not a crime for a person to discharge a weapon in the rural area where respondent lived (J.A. 127). Only the conditions of respondent's probation made his possession of a firearm relevant. The officers had no reason to suspect that respondent had a narcotics laboratory in his basement; the officers inadvertently discovered that equipment lying in plain view while they were conducting their search for weapons (*id.* at 117-122, 190-191).

The facts on which the court of appeals relied do not even remotely support the court's conclusion that the search was a subterfuge. Although respondent had not been assigned a probation officer at the time of the search, that does not mean that the search was unrelated to the purposes of respondent's probation. Under California law, a trial court's failure to place a probationer under the supervision of the probation

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[18] Respondent hints (Br. in Opp. 22 n.22) that the prosecutor may have sought to uncover marijuana on respondent's property. That suggestion, however, is baseless. As explained above (page 4 note 2), before the search of respondent's residence the prosecutor had received a report from one of respondent's neighbors that marijuana was growing on the border between the neighbor's property and respondent's. That report was investigated and was determined to be unfounded prior to the search. There is no evidence that the prosecutor sought to search respondent's residence because she believed that respondent possessed narcotics.

office does not affect the validity of the judgment of probation.[19]

Likewise, the court of appeals' judgment that the search was not part of an effort to rehabilitate respondent (see Pet. App. 11a-12a) is as remarkable as it is inapposite. Even if true, it would not render the search invalid as a bad faith probation search. The decision to search respondent's residence was prompted by reports of gunfire from his property and therefore was directly related to the reason he was forbidden to possess firearms while he was on probation. Under California law, it is clear that the protection of the public is an important goal of the probation system. Cal. Penal Code § 1202.7 (West 1982); *People* v. *Mason*, 5 Cal. 3d at 764, 488 P.2d at 632, 97 Cal. Rptr. at 304; cf. *People* v. *Britton*, 156 Cal. App. 3d at 697, 202 Cal. Rptr. at 887 (parole). Determining whether respondent was in possession of firearms was directly related to this aspect of his probation. After all, respondent had

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[19] *In re Herron*, 217 Cal. 400, 404-405, 19 P.2d 4, 6 (1933); *In re Young*, 121 Cal. App. 711, 713, 10 P.2d 154, 155 (1932); *In re Giannini*, 18 Cal. App. 166, 169, 122 P. 831, 832 (1912); 16 Op. Att'y Gen. 72, 73, 75 (1950) (construing Cal. Penal Code § 1215 (West 1982)). The county probation officer is responsible for determining the level of supervision necessary for persons on probation. Cal. Penal Code § 1202.8 (West 1982). Compare *id.* § 1203(a) and (d) (Supp. 1986) (a "conditional sentence" is a form of unsupervised conditional release). In this case, the county probation department decided to await the outcome of respondent's pending appeal before undertaking his supervision. J.A. 89 (probation officer's "Supplemental Report and Petition") ("Following imposition of sentence the defendant exercised his right to appeal the judgment of the case. Probation supervision was not provided pending the appeal outcome.").

recently been convicted of brandishing firearms, which was apparently not the first time that he had wrongfully been involved with weapons (see J.A. 38-39, 42-43, 159-161), and the judge who had imposed respondent's probation insisted that he not possess firearms.[20] And even on the question of rehabilitation, the court of appeals was mistaken. Discouraging or preventing a probationer from causing the same public danger for which he had been convicted in the first place could scarcely be closer to the purpose of rehabilitation.

For much the same reason, it is immaterial that the prosecutor did not inform the sentencing judge at the February 27 hearing of the reports of gunfire on respondent's property or of her intent to search his residence for weapons. In light of the judge's insistence that respondent not possess weapons, this information surely would not have dissuaded the judge from granting the prosecutor's motion for clarification. In any event, the prosecutor expressly told respondent's counsel before that hearing began about those reports (J.A. 166), so it is clear that she was not attempting to keep any information from re-

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[20] Before imposing sentence the state trial court commented (J.A. 38-39): "[W]hat concerns the Court is this gun business. * * * What really scares me, Mr. Merchant, in my role in protecting the community[,] is that you are just that close in certain instances to violence being committed, and you are just not a man that should have or be near any guns at all. * * * [H]ere we are again, we are three years down the road with the same problem and had the officer acted any differently, you might have been the recipient of some bloodshed. That is the scarey [*sic*] thing about you and guns." The municipal court's comments also suggest that this was not respondent's first firearms offense. See also *id.* at 42-43, 159-161.

spondent. In sum, there is no legal or factual support for the contention that the March 3 search was a bad-faith "subterfuge" for a criminal investigation. For that reason, even if the consent-to-search clause in respondent's sentence was invalid, the evidence obtained in good faith reliance on that clause should not have been suppressed.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20310

SUPREME COURT, U.S.
FILED
OCT 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1672

In The

# Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,

*Petitioner,*

v.

WILLIAM D. MERCHANT,

*Respondent.*

**On Appeal to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Whether a defendant's rights to due process and to be free of unreasonable searches and seizures are violated by a warrantless search conducted pursuant to a probation condition, that was imposed in his absence, without his knowledge, and without his consent.

2. Whether the "good faith" exception to the Fourth Amendment exclusionary rule should be expanded beyond the warrant context to apply to law enforcement officers' purported reli nce on a search clause in a defective probationary order which the officers knew was entered without notice to the defendant.

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No. 85-1672

In The
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October Term, 1986

UNITED STATES OF AMERICA,
*Petitioner,*

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WILLIAM D. MERCHANT,
*Respondent.*

**On Appeal to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT

## STATEMENT

Although the factual statement of the government's brief is substantially accurate, some clarification and elaboration will assist the Court's consideration of the issues.

1. Respondent never agreed that he would be bound by the conditions of probation. At the misdemeanor sentencing hearing on November 14, 1980, the Municipal Court articulated several conditions of probation and then an-

nounced that the "sentence will be stayed pending your appeal", but never inquired whether respondent consented to those conditions. Similarly, the form which respondent signed at the conclusion of the hearing called for respondent's acknowledgement that he had "read and understood the . . . conditions of probation" (E.R. 119), but nowhere did respondent manifest his consent to those terms.[1] More importantly, it is undisputed that respondent signed this document only because he knew that his sentence (including all of the terms of probation) had been stayed pending appeal and because he was informed that signing the document was necessary "to get the stay pending appeal. . . ." (J.A. 92-93, 185-186.)

The form which bears respondent's signature expressly required his formal supervision by a probation officer, who could direct petitioner to undergo counseling. (J.A. 33.) In the normal course of events where a defendant in criminal misdemeanor proceedings is admitted to formal probation in Santa Cruz County, the Municipal Court sends notice to the Probation Department which then assigns an officer to supervise the probationer (J.A. 202.) If the probationer fails to report to the officer, the department petitions the court to revoke probation. (*Ibid.*) Here, respondent was never assigned to nor referred to a

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[1]Petitioner continues to inaccurately refer to a second document as the Municipal Court's "judgment." (Petitioner's Brief at 3, n.1.) The state prosecutor previously described that document, which does not bear the judge's signature, as a "confinement form." (J.A. 184.) Moreover, although the District Court indicated it would take judicial notice that the document was "the formal sentencing document", it was never moved or received into evidence and is not a part of the record in this case. (J.A. 96, 184-185.)

probation officer; and respondent never reported to one. (*Ibid.*) Moreover, a petition to revoke respondent's probation for these reasons was never filed, the department recognizing that probation was stayed "pending the appeal outcome." (J.A. 89.)

2. The local prosecutor testified that she received complaints of gun fire occurring on respondent's property in early to mid-January, and learned of another incident allegedly involving a threat by respondent in early February. (J.A. 163-165.) Although she professed concern that respondent had violated the terms of his probation (J.A. 165-166), the prosecutor took no steps to ensure that respondent was assigned to a probation officer or received supervision. Instead, on February 11, 1981, the prosecutor filed a motion for "Clarification and/or Modification of Stay of Judgment" with the intention of conducting a warrantless search of respondent's residence as soon as possible after the motion was granted. (J.A. 171-173.) The prosecutor decided to file the motion because she was not sure whether the search clause was in effect. (J.A. 46, 63.)

This motion was heard by the Municipal Court on February 27, 1981. (Pet.App. 22a.) Notice of the motion had been served on respondent's counsel who appeared at the hearing. (J.A. 98.) However, it is undisputed that counsel had failed to inform respondent of either the motion or the hearing. (J.A. 98; 105.) Although the Municipal Court noted respondent's absence, it made no inquiry concerning respondent's waiver of his right to be present or of counsel's authority to act on behalf of respondent in his absence. (Pet.App. 22a.) Without objection from

respondent's counsel, the Municipal Court granted the motion and stated that respondent would "be *reinstated* on the terms of probation." (Emphasis added.) (*Ibid.*)

At the time of the hearing on the motion for clarification/modification the local prosecutor informed neither the Municipal Court judge nor defense counsel of her intention to conduct a warrantless search of respondent's residence as soon as possible after the motion was granted. (Pet.App. 12a.)

3. Shortly after the hearing on February 27, the prosecuting attorney informed an investigator in her office that the motion had been granted and told him that "I want a search . . . ." (J.A. 66, 123.) However, because of manpower difficulties, a search party could not be assembled until March 3, 1981, four days later. (J.A. 123-124.)

Also on February 27, respondent's counsel wrote a letter to respondent informing him for the first time of the prosecutor's motion and alerting respondent that his probation was now in effect. (J.A. 99-100, 109-110.) However, the letter was later returned to counsel unopened and respondent remained unaware of the court's order until nine armed police officers, led by the prosecuting attorney, arrived at his residence prepared to forcibly enter and search. (J.A. 100-101.)

The search party arrived at the premises at approximately 11:00 a.m. on Tuesday, March 3, 1981. (J.A. 115.) Included in its number were several local police officers, including representatives from narcotics enforcement, as well as the prosecuting attorney who had filed the motion to modify respondent's probation status in order to be

able to enter respondent's home without a warrant. (J.A. 82, 166, 179-180.) Upon the group's arrival at respondent's door, respondent insisted that he was not on probation and refused them entry. (J.A. 116-117.) There ensued "quite a lot of conversation." (J.A. 71.) Respondent then requested and was permitted to call his attorney, who spoke to the prosecutor and confirmed that respondent had not yet been informed of the February 27th order subjecting him to the terms of probation. (J.A. 71-73, 99, 116-117, 179-180.) The two attorneys went on to discuss the legal ramifications of the lack of notice, and the prosecutor asserted that "in a misdemeanor matter, an attorney's actions are binding on his client. The client does not need to be present." (J.A. 72.)

Following his conversation with the prosecutor, respondent's counsel telephoned the Municipal Court judge who had presided at the February 27th hearing. (J.A. 102.) Judge MARLO then telephoned the prosecuting attorney at respondent's residence to discuss the situation. (J.A. 74-75, 180.) Having been informed for the first time that respondent had never received notice of the February 27th proceedings and remained unaware of the Court's order until the arrival of the search party, Judge MARLO told the prosecutor:

> . . . on more than one occasion . . . well, don't, don't take this conversation to mean that I have any opinion as to whether you should or shouldn't be doing what your doing.
>
> (J.A. 74-75.)

Despite her knowledge that respondent's probation had been reinstated in his absence, without his knowledge,

and at proceedings at which respondent's counsel had appeared without authority, the prosecuting attorney determined that the search should begin. (J.A. 73.) Ultimately, the search produced the contraband, chemicals, and laboratory equipment which underlay the charges that were filed against respondent in the District Court. (J.A. 129-130.)

4. On the basis of the evidence discovered during the March 3, 1981 search, the Municipal Court revoked respondent's probation. Subsequently, however, the Superior Court appellate division reversed that decision on the grounds that respondent could not be bound by probation conditions which went into effect without his knowledge:

> Due process and elementary considerations of fairness preclude revocation of probation and imposition of a jail sentence unless the defendant had theretofore been unequivocally apprised of his probation status.
>
> (J.A. 200.)

5. In denying respondent's motion to suppress, the United States District Court held that respondent's probation was in effect from the date of his sentencing on the misdemeanor offenses—i.e., November 14, 1980. (Pet. App. 17a.)[2] Alternatively, the District Court held that even if respondent was not on probation, the suppression remedy was inappropriate because the officers who executed the search had reasonably relied on the probation order. (Pet.App. 18a.)

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[2]This holding made it unnecessary for the District Court to concern itself with the legal significance of the February 27th order, and the court did not in fact address that issue.

6. In reversing, the Ninth Circuit Court of Appeals first recognized that the question whether respondent was subject to the conditions of probation (and hence to the search clause) at the time of the March 3rd search is governed by state law, subject only to the minimum protections afforded by the federal constitution. (Pet.App. 4a.) The court next determined that under state law, respondent's entire probationary sentence was stayed because the sentencing Municipal Court judge did not specify otherwise. (Pet.App. 5a-6a.)[3] Significantly, petitioner does not seek review from this Court of either of these holdings.

The Court of Appeals next considered the effect of the February 27th order. (Pet.App. 6a-10a.) Given the Court of Appeals' prior holding that respondent was not on probation prior to that date, it followed that the Municipal Court's order vacating the stay constituted "an initial imposition of probation." (Pet.App. 8a.) Because the effect of that order was to impose substantial burdens on respondent's liberty and fundamental rights, the Court of Appeals held that federal due process was violated by the absence of any notice to respondent concerning the February 27th proceedings or order. (Pet.App. 8a-10a.) This aspect of its decision was supported, the Court of Appeals noted, by the fact that respondent's state and federal rights to be present at all stages of the proceedings had also been truncated by the Municipal Court's action. (Pet.App. 10a.) Finally, the Court of Appeals emphasized that the emasculation of respondent's rights

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[3]The Court of Appeals determined that this conclusion was compelled by *In re Kennick*, 128 Cal.App.3d 959, 963, 180 Cal. Rptr. 731, 733 (1982). See also, *People v. Soukup*, 141 Cal.App. 3d 858, 190 Cal.Rptr. 635 (1983).

in the Municipal Court proceedings was compounded by the decision of the state authorities not to "postpone [ ] the search until it could be sure that [respondent] had received notice [of the order] from the court." (Pet.App. 10a.)

The Court of Appeals also rejected the contention that the suppression remedy should not be invoked because of the executing officers' purported good faith reliance on the search clause of the probation order. (Pet.App. 10a-13a.) Assuming without deciding that the rationale of the *United States v. Leon*, 468 U.S. 897 (1984) might apply outside the warrant context, the Court of Appeals ruled that the suppression remedy was nevertheless mandated because "the state authorities' conduct was not objectively reasonable." (Pet.App. 11a, n. 6.) In reaching this conclusion, the Court of Appeals emphasized the single-mindedness with which the state authorities had engineered the "reinstatement" of respondent's probation and had then hastily organized a search despite their knowledge that respondent had received no notice that his probation had been "reinstated," and was consequently unaware that the probationary terms which the authorities suspected him of violating were then in effect.[4] The Court of Appeals concluded that the authorities' zealous determination to investigate suspected probation violations which they knew had occurred prior to the probation's "reinstatement,"

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[4]As the Court of Appeals noted, the state authorities determined to conduct the search while knowing that respondent had received no supervision or counseling, had not been referred to probation officer, and that no other efforts towards the rehabilitation of respondent or the protection of society had been made. (Pet.App. 12a.)

rendered their motives for the search suspect and their conduct objectively unreasonable. (Pet.App. 12a-13a.)

7. Following the Court of Appeals' decision, the government filed a petition for rehearing with a suggestion for *en banc* review. Said petition was reviewed by the entire court, but not a single judge requested a vote. (Pet. App. 19a.)

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## INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Court of Appeals correctly ruled that the failure of actual notice to respondent of the February 27th hearing and order violated Due Process because that order deprived respondent of fundamental rights and liberty interests. Moreover, whether viewed as an "initial imposition of probation" (Pet.App. 8a) or as an advancement of probation's effective date, the February 27th order emasculated respondent's rights under California law to reject probation altogether or to seek a modification of specific probationary terms which he found objectionable before being subjected to them. Significantly, the "reinstatement" order was also invalid under state law; and *certiorari* on this issue was therefore improvidently granted.

Contrary to petitioner's assertions, the Court of Appeals ruling constitutes neither a departure from the principles of representative litigation nor an imposition of novel and onerous obstacles to the administration of justice. Instead, the decision merely mandates compliance with routine and common sense procedures which are in

fact independently required by California statute. Because the Municipal Court failed to follow these procedures, with the result that respondent received no notice of the hearing, the order "reinstating" probation was a nullity.

II. The government's invitation for this Court to consider extending the good faith exception to the exclusionary rule to include reasonable reliance on a defective probation order should be rejected in the first instance because this case does not arise from a valid probation search under California law.[5] Because the decision to search was made prior to the issuance of the order "reinstating" respondent's probation and the complaints which were purportedly being investigated had been lodged several weeks prior to that date, the search clearly was not based on a reasonable suspicion that respondent had violated a term of his probation. See, *People v. Guerrero,* 85 Cal. App.3d 572, 581, 149 Cal.Rptr. 555, 560 (1978). Similarly, because the officers learned prior to commencing the search that respondent had received no notice that he was on probation, they knew that respondent had also had no opportunity whatsoever to comply with the probationary terms, and they therefore had no reason to believe that "in connection with effective probation supervision, a search was advisable." *People v. Guerrero, supra,* 85 Cal. App.3d at 581, 149 Cal.Rptr. at 560.

The invitation should also be rejected for the simple reason that this is not a good faith case. Here, the exe-

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[5]Again, *certiorari* was improvidently granted on the good faith issue because the Court of Appeals' holding that the case does not involve a valid probation search under state law makes the officers' good faith irrelevant. (Pet.App. 12a-13a.)

cuting officers did not rely upon facially valid court rulings which, for reasons unknown to them, were defective. To the contrary, the leaders of the search party independently considered and rejected a potential legal inadequacy in the probation order which had not previously been presented to or ruled upon by the Municipal Court. Because the leaders determined to proceed with the search after receiving notice of a latent defect in the order upon which they relied, their decision to search first and to litigate the validity of the order later does not come within the rationale of the good faith exception as enunciated in *United States v. Leon, supra,* 468 U.S. 897 and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984).

Finally, the policies which caused this court to fashion the good faith exception in the warrant context are not applicable to probation searches. In the probation context the magistrate plays no part in the decision to search; and, conversely, the executing officers rarely have any knowledge of the regularity of the court proceedings in which the order was fashioned. Accordingly, the cost benefit analysis which this Court found compelling in the warrant context militates against adoption of a similar rule where a search is conducted in reliance on a defective probation order.

## ARGUMENT

### I.

### THE FEBRUARY 27TH ORDER PURPORTING TO REINSTATE RESPONDENT'S PROBATION VIOLATED DUE PROCESS OF LAW.

The pobationary terms that were announced by the Municipal Court at the sentencing hearing on November 14, 1980 contemplated substantial restraints on both respondent's liberty and his most fundamental constitutional rights. (J.A. 40.) These included his submission to supervision by a probation officer, his participation in therapeutic counselling, and the forfeiture of his rights to bear arms and to be free of unreasonable searches and seizures under the Second and Fourth Amendments. (J.A. 33, 40.) At the conclusion of the sentencing hearing, respondent correctly concluded that he was not subject to any of these restraints, duing the pendency of his appeal.[6] Nevertheless, on February 27, 1981, during proceedings at which respondent was not present and of which he had no actual notice, the Municipal Court issued an order purporting to impose on him all of the terms and conditions of probation as of that date. (Pet.App. 22a.)

As a consequence, and through no fault of his own, respondent was thereby unknowingly subjected to all of the restraints of liberty inherent in the terms of probation that the Municipal Court had announced on November 14, 1980. Given these fundamental implications, the Court of Ap-

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[6]The Court of Appeals' conclusion that respondent was not on probation following the November 14, 1980 hearing is not challenged by the government. (Pet.App. 5a-6a.) This conclusion was compelled by the applicable state law. See, *In re Kennick, supra,* 128 Cal.App.3d at 863, 180 Cal.Rptr. at 733.

peals correctly determined that the "reinstatement" order violated the due process clause of the Fourteenth Amendment and was a nullity. (Pet.App. 8a-10a.)

1. The legal significance of the Municipal Court's "reinstatement" order can only be understood in the context of the applicable state law concerning probation. California courts have adopted a contractual theory for the imposition of probation: in exchange for a less harsh sentence, the defendant may accept those restrictions of his rights which are inherent in the probationary conditions. *People v. Mason,* 5 Cal.3d 759, 763-764, 488 P.2d 630, 632, 97 Cal.Rptr. 302, 304-305 (1971), *cert. denied,* 405 U.S. 1016 (1972);[7] *In re Bushman,* 1 Cal.3d 767, 776-777, 463 P.2d 727, 733, 83 Cal.Rptr. 375, 381 (1970). As several courts have explained, "probation is a 'bargain' made by the People with the malefactor. . . ." *People v. Atwood,* 221 Cal. App.2d 216, 222, 34 Cal.Rptr. 361 (1963); *People v. Johnson,* 134 Cal.App.2d 140, 143, 285 P.2d 74, 76 (1955). Consistent with this approach, a defendant in the state's courts "has the right to refuse probation, a right of which he cannot lightly be deprived." *In re Osslo,* 51 Cal.2d 371, 377, 334 P.2d 1, 5 (1958). See also, *In re Bushman, supra,* 1 Cal.3d at 776, 463 P.2d at 733, 83 Cal.Rptr. at 381; *People v. Brasley,* 41 Cal.App.3d 311, 316, 115 Cal.Rptr. 910, 913 (1974).

Moreover, a defendant who appeals his conviction need not manifest such refusal at the sentencing hearing, but may wait instead until the appeal is finally resolved:

> [W]hatever may be within the trial court's permissible scope of conditions for *granting* probation it

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[7]*Mason* was disapproved on other grounds in *People v. Lent,* 15 Cal.3d 481, 541 P.2d 545, 124 Cal.Rptr. 905 (1975).

> could not make petitioners' right to *reject* the offer of probation conditional upon their immediate announcement of rejection.
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> *In re Osslo, supra,* 51 Cal.2d at 382, 334 P.2d at 8 (emphasis in original).

In *Osslo,* for example, the California Supreme Court held that the petitioners could not be denied the right to reject probation and demand sentence following the final determination of their appeal, even though their sentences had not been stayed pending appeal. 51 Cal.2d at 382-383, 334 P.2d at 8. Here of course, respondent's sentence was stayed peding appeal by the Municipal Court. (See, Opp., *supra,* at 1.) Accordingly, respondent had the right to reject probation and to demand sentence when and if his appeal was resolved against him.

As a corollary to the above rules, California courts invoke an implied waiver theory of Fourth Amendment rights when a search clause is imposed as a condition of probation. Moreover consistent with this Court's decisions concerning the waiver of fundamenal rights, the state courts "jealously guard" against the wholesale or unwitting relinquishment of such rights in the probation context and "indulge every reasonable presumption against waiver. . . ." *Blair v. Pitchess,* 5 Cal.3d 258, 274, 486 P.2d 1242, 1253, 96 Cal.Rptr. 42, 53 (1971), quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Thus, a waiver will not be presumed or implied;[8] where a waiver is found, it will be

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[8]See, *People v. Myers,* 6 Cal.3d 811, 817-818, 494 P.2d 684, 688, 100 Cal.Rptr. 612, 616-617 (1972) (defendant's status as an outpatient of a narcotics clinic did not imply waiver); *Freytes v. Superior Court,* 60 Cal.App.3d 958, 962, 132 Cal.Rptr. 26, 29 (1976) (no waiver where probation was revoked and reinstated without express reference to maintenance of the previous search condition).

strictly and narrowly construed;[9] and where a waiver is relied upon by government officials, they bear the burden of showing "by clear and positive evidence that the consent was freely, voluntarily and knowledgeably given. [Citations omitted.]" *Blair v. Pitchess, supra,* 5 Cal.3d at 274, 486 P.2d at 1253, 96 Cal.Rptr. at 53. See also, *People v. Shelton,* 60 Cal.2d 740, 744, 36 Cal.Rptr. 433, 436, 388 P.2d 665, 668 (1964).

From a constitutional perspective, then, probation under California law has many significant similarities to a plea bargain, which this Court has repeatedly considered. See, e.g., *Santobello v. New York,* 404 U.S. 257 (1971). In both instances, a consensual bargain is struck by which the state (through either the court or the prosecution) agrees to less than the maximum penalty in exchange for the defendant's relinquishment of specified rights and/or his commitment to perform specified deeds. See, *Mabry v. Johnson,* — U.S. —, 104 S.Ct. 2543, 2547 (1984); *Brady v. United States,* 397 U.S. 742 (1970); *People v. Mason, supra,* 5 Cal.3d at 763-764, 488 P.2d at 632, 47 Cal.Rptr. at 304-305. Given the fundamental implications of the defendant's side of the bargain, the courts in both contexts have also established rigorous procedures to assure that the defendant knowingly and voluntarily enters into the agreement. *Boykin v. Alabama,* 395 U.S. 238 (1969); *Santobello v. New York, supra,* 404 U.S. at 261-262; *People v. Mason, supra,*

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[9]See, *People v. Superior Court (Stevens),* 12 Cal.3d 858, 528 P.2d 41, 117 Cal.Rptr. 433 (1974) (consent to search "upon request" means defendant must receive advance notice of search); *People v. Bremmer,* 30 Cal.App.3d 1058, 1064, 106 Cal.Rptr. 797, 801 (1973) (probation condition permitting warrantless searches does not constitute waiver of right to be searched only upon reasonable cause).

5 Cal.3d at 763-765, 488 P.2d at 632-633, 47 Cal.Rptr. at 304-305. Thus, in both instances, if the defendant is erroneously or inadequately advised of the rights he is waiving by entering into the bargain, then he is entitled to relief which may include specific performance, rescission, or a modification to conform to the defendant's reasonable understanding. *Mabry v. Johnson, supra,* 104 S.Ct. at 2548, n.11; *Santobello v. New York, supra,* 404 U.S. at 262-263; *People v. Superior Court (Stevens), supra,* 12 Cal.3d 858, 528 P.2d 41, 117 Cal.Rptr. 433.

2. Applying these principles, it is clear that under California law there was no Fourth Amendment waiver in this case. At the sentencing hearing, respondent never consented to the probationary terms. Compare, *Freytes v. Superior Court, supra,* 60 Cal.App.3d at 962, 132 Cal. Rptr. at 29 (wherein defendant orally agreed to warrantless search condition). Nor did the written form which respondent signed at the conclusion of the hearing call for respondent's consent to the conditions. (J.A. 33.) Thus, the record does not contain a clear and unequivocal expression of respondent's free and voluntary consent to the terms of the probation, as required by California law. See, *People v. Myers, supra,* 6 Cal.3d at 819, 494 P.2d at 689, 100 Cal.Rptr. at 617.

Nor may this inadequacy be dismissed as a technical or insignificant omission. To the contrary, even if it could be argued that by signing the document setting forth the probationary conditions respondent implicitly consented to those terms, then the "bargain" that he struck was subject to the condition precedent that none of the probationary conditions would become effective until after respondent's appeal was resolved. Undisputably, this was

respondent's understanding. (J.A. 72-73.) Indeed, the record is uncontroverted that respondent signed the document only because he was informed that doing so was the *quid pro quo* for issuance of the stay pending appeal. (J.A. 92-93.) In other words, whatever respondent may have waived or consented to at the sentencing hearing was done with the express understanding that he would not be subject to any restraints during the pnedency of his appeal and could reasonably anticipate that the restraints would never go into effect, assuming that he prevailed on appeal. Accordingly, this was the bargain that was struck at the sentencing hearing, and respondent was entitled both to rely on it and to enforce it. See, *People v. Superior Court (Stevens), supra,* 12 Cal.3d 858, 528 P.2d 41, 117 Cal.Rptr. 433; *People v. Bemmer, supra,* 30 Cal.App.3d at 1064, 106 Cal.Rptr. at 801. See also, *Santobello v. New York, supra,* 404 U.S. at 262-263.

3. The conclusion that Due Process was offended by the reinstatement order is independently compelled by the decision of the Superior Court setting aside respondent's probation revocation. The Superior Court found that respondent had not been "unequivocally apprised of his probationary status" and therefore determined that punishing him for his failure to abide by the probationary terms would violate Due Process of Law. (J.A. 200.)[10] From this ruling it necessarily follows that there was also a failure to "unequivocally apprise" respondent that he had relinquished his Fourth Amendment rights, since *that*

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[10]The Superior Court was presumably relying on state constitutional provisions. Article I, Section 15 of the California Constitution guarantees defendants in state criminal proceedings that they will enjoy due process of law.

waiver was but an element of his "probationary status." Because such advisement is a prerequisite to a "knowing and intelligent waiver" [*People v. Myers, supra,* 6 Cal.3d at 819, 494 P.2d at 689, 100 Cal.Rptr. at 617; *Freytes v. Superior Court, supra,* 60 Cal.App.3d at 962, 132 Cal.Rptr. at 29], the Superior Court's order setting aside the probation revocation precludes a finding that respondent gave his advance-consent to warrantless searches on this record.[11]

4. Apart from the notice problems, the February 27th proceedings were also rendered fatally defective by respondent's absence. (Pet.App. 10a.)[12] As argued in respondent's Opposition to the Petition for a Writ of Certiorari, these procedural inadequacies provide independent state grounds for the Court of Appeals' decision. (Opp. at 8-16.) For this reason, the validity of the February 27th "reinstatement" order fails to present an important question of federal law, and *certiorari* was improvidently granted.

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[11]It is true, as petitioner notes, that the Superior Court included a disclaimer that its decision should not be construed as disagreement with the District Court's ruling in this case that the March 3rd search was lawful. (E.R. 118-119.) However, the lawfulness of the search was not before the Superior Court, and the state court judge cannot be faulted for failing to recognize tnat his determination that there was inadequate notice to respondent concerning his probationary status under state law would be binding on a federal court. (See, this Brief, *supra,* at 7.)

[12]Although the Court of Appeals declined to decide whether respondent's absence from the February 27th proceedings rendered them invalid (Pet.App. 10a, n. 5), the case law on this subject also mandates the result reached by the Court of Appeals.

Both the state and federal constitutions guarantee criminal defendants the right to be present at all stages of the proceedings. See, *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Olney v. Municipal Court,* 133 Cal.App.3d 455, 459, 184 Cal.Rptr. 78, 80 (1982); *People v. Kriss,* 96 Cal.App.3d 913, 916, 158 Cal.Rptr. 420, 421 (1979).[13] At the same time, the California legislature has granted defendants in misdemeanor proceedings the right to be *absent* and to appear through counsel. See, Penal Code § 977(a). However, because exercise of this statutory right necessarily entails a waiver of the more fundamental right to be present, the California courts characterize the former as "conditional" in nature:

> A defendant who absents himself must do so with full knowledge of the pendency of the criminal proceedings, as the waiver of the right to be present must be a knowing and intelligent one.
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> *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 460-461, 184 Cal.Rptr. at 81.

*Turner v. Municipal Court,* 131 Cal.App.3d 643, 648, 182 Cal.Rptr. 650, 652 (1982). Thus, where counsel appears without his client, the court must satisfy itself "that the acts of counsel are authorized by the absent defendant." *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 461, 184 Cal.Rptr. at 81. See also, *Mills v. Municipal Court,* 10 Cal.3d 288, 304-305, 515 P.2d 273, 285, 100 Cal.Rptr. 329 (1973); *Turner v. Municipal Court, supra,* 131 Cal.App.3d

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[13]In California, the right to be present is secured by Article I, Section 15, of the state constitution. See, *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 459, 184 Cal.Rptr. at 80.

at 648, 182 Cal.Rptr. at 652; *People v. Kriss, supra,* 96 Cal.App.3d at 917, 158 Cal.Rptr. at 422.[14]

In this case the record establishes that respondent was not present at the February 27th hearing, that the Municipal Court noted respondent's absence but did not inquire concerning counsel's authority, and that a waiver of respondent's right to be present was not otherwise shown. (Pet.App. 22a; J.A. 64.) Indeed, it is uncontroverted that respondent was completely unaware of the proceedings, thereby precluding a finding that he was "knowingly" absent and had authorized the acts of counsel. Accordingly, under California law, respondent's constitutional right to be present was violated by the February 27th proceedings.

Moreover, prejudice to respondent was manifest in the conduct of those proceedings in his absence and without proper inquiry by the court.[15] First, as previously demonstrated, the defective procedure ignored the require-

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[14]Pragmatically, California's courts permit reliance upon defense counsel's representation that his client is knowingly absent and has authorized counsel to act on his behalf. *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 461, n. 5, 184 Cal.Rptr. at 81; *People v. Singer,* 115 Cal.App.3d Supp. 7, 11, 171 Cal.Rptr. 587, 589 (1981). However, the case law affirmatively rejects petitioner's contentions that "notice to counsel is considered notice to the client. . . ." and that the Municipal Court was justified in assuming proper notice to and waiver by respondent from the appearance of his counsel at the hearing. (See, e.g., *Turner v. Municipal Court, supra,* 131 Cal.App.3d at 648, 182 Cal.Rptr. at 652.) (Compare, Petitioner's Brief at 14-15.)

[15]An order issued in violation of a defendant's state constitutional right to be present cannot stand if the defendant was prejudiced by it. *People v. Kriss, supra,* 96 Cal.App.3d at 920, 158 Cal.Rptr. at 424; *People v. Williams,* 10 Cal.App.3d 745, 749-752, 89 Cal.Rptr. 364, 366-368 (1970).

ment of California law that respondent expressly consent to imposition of the terms and conditions of probation. *People v. Mason, supra,* 5 Cal.3d at 763-764, 488 P.2d at 631-632, 97 Cal.Rptr. at 304-305. Second, and conversely, the February 27th proceedings emasculated respondent's right to *reject* probation and demand sentence. See, *In re Osslo, supra,* 51 Cal.2d at 382, 334 P.2d at 8. Third, the hearing *in absentia* during the pendency of the appeal deprived respondent of any opportunity to seek modification of specific probationary terms (such as the search clause) which he found objectionable. *Id.*, 51 Cal.2d at 380, 334 P.2d at 8. Fourth, and most fundamentally, the proceedings permitted the Municipal Court to strip respondent of his Fourth Amendment rights and to impose affirmative obligations upon him (including the requirement that he forego his Second Amendment right to bear arms), in circumstances which both disserved the rehabilitative purposes of the search clause,[16] and precluded timely efforts by respondent to conform his behavior to probation's affirmative mandates.

5. The government's brief fails to address any of these issues. Instead, relying exclusively on decisions in civil cases, the government insists that "notice to a party's counsel . . . is equivalent to notice to the party himself" and that a party is deemed to have "notice of all facts,

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[16]As a matter of common sense, a probationary search clause cannot positively influence an individual's behavior if he is unaware that it has been imposed. If an individual has "*knowledge* he may be subject to a search at any time, he will be less inclined to have narcotics or dangerous drugs in his possession. [Empahsis added.]" *People v. Kern,* 264 Cal.App. 2d 962, 965, 71 Cal.Rptr. 105, 107 (1968). Without notice, however, the search condition can have no such effect.

notice of which can be charged upon [his] attorney." (Petitioner's Brief at 12-16.) See also, *Link v. Wabash R.R.*, 370 U.S. 626, 634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)). This argument, however, stands on several patently false premises.[17]

First, the government suggests that the scope of a litigant's right to actual notice of scheduled court proceedings is defined by the requirement that the opposing party personally serve him. (Petitioner's Brief at 12-13, 18.) Obviously, in the context of criminal proceedings, this is simply incorrect. Indeed, it cannot seriously be disputed that the full panoply of rights subsumed within the concepts of due process and the right to defend are personal to the accused.

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him" and who must be accorded "compulsory process for obtaining witnesses in his favor."
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> *Farretta v. California*, 422 U.S. 806, 819 (1975).

Consistent with this principle, this Court long ago recognized that the Fourteenth Amendment grants the ac-

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[17]The argument is also disloyal to the facts of this case. Here, notice to the attorney cannot be "deemed" to be notice to the client, because it is uncontroverted that respondent never had notice. Since the prosecutor learned of the failure of actual notice before making the decision to begin the search, the government cannot now resort to inferences and assumptions. Indeed, given these facts, any ruling by this Court as to what may have been "deemed" or "inferred" concerning notice would be merely advisory.

cused the right "to be present in his own person whenever his presence bears "a relation, reasonably substantial" to the meaningful exercise of his right to defend. *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934). And while it is true that the defendant may consent to the holding of proceedings in his absence, the courts universally agree that such consent will not be found unless the accused's knowing and intelligent relinquishment of his right to be present affirmatively appears in the record. *Taylor v. United States*, 414 U.S. 17, 19-20 (1973); *Diaz v. United States*, 223 U.S. 442, 455 (1912); *United States v. Christopher*, 700 F.2d 1253, 1261-1262 (9th Cir. 1983), *cert. denied*, 461 U.S. 960 (1983); *United States v. Crews*, 695 F.2d 519, 520-521 (11th Cir. 1983); *United States v. Crutcher*, 405 F.2d 239, 243-244 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969). Thus, at a minimum, Due Process requires personal notice to the accused whenever his rights to defend and to be present are implicated. *United States v. Christopher, supra*, 700 F.2d at 1261-1262; *United States v. Crews, supra*, 695 F.2d at 520-521; *United States v. Peterson*, 524 F.2d 167, 184-185, n.41 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *Government of Virgin Islands v. Brown*, 507 F.2d 186, 188-189 (3d Cir. 1975); *United States v. Crutcher, supra*, 405 F.2d at 243-244.

Second, the government contends that because defense counsel has a duty to keep his client abreast of developments in the litigation,[18] the prosecution and the trial court may reasonably assume that counsel has fulfilled that obligation. However, this proposition is flatly contradicted by

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[18]Here, defense counsel admitted that he failed to fulfill this aspect of his professional obligations to respondent. (J.A. 105.)

the foregoing authorities governing waiver of a defendant's right to be present.[19] More generally, this Court has long recognized that it is ultimately the trial court's responsibility to ensure the regularity of its proceedings and to see that they are fundamentally fair. See, e.g., *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) (court must dismiss where government deports a material witness with "reasonable likelihood" that witness' testimony would have affected verdict); *Webb v. Texas*, 409 U.S. 95 (1972) (court must protect against interference with defendant's right to call witnesses); *Brady v. Maryland*, 373 U.S. 83 (1963) (court must assure that prosecutor does not suppress material evidence). This obligation includes taking reasonable steps to see that even those defendants who enjoy the assistance of counsel do not unwittingly relinquish substantial rights. See, e.g., *Boykin v. Alabama, supra*, 395 U.S. 238.

Third, ignoring the fundamental implications of the "reinstatement" order entailed for respondent, the government assumes that the February 27th proceeding involved "a purely legal question" and was therefore not a "critical point" in the litigation that would trigger respondent's right to be present. (Petitioner's Brief at 16-18.)[20] Quite

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[19]The proposition is also contrary to the applicable state law on the question. (See this Brief, *supra*, at 19-21.)

[20]The government's current understatement of the legal significance of the February 27th proceedings was flatly contradicted by the state prosecutor who, when asked why she assumed that respondent's counsel had informed respondent about the hearing, stated that "I couldn't imagine an attorney who would voluntarily put his client in that position and not tell him." (J.A. 68)

to the contrary, as previously demonstrated, enforcement of the probation order entailed the relinquishment of liberty interests and constitutional rights which were personal to respondent and which only he could waive. See, *People v. Myers, supra,* 6 Cal.3d at 817-818, 494 P.2d at 68, 100 Cal.Rptr. at 616-617. (See this Brief, *supra,* at 13-17.) Even more importantly, respondent had the absolute right to reject probation altogether. *In re Osslo, supra,* 51 Cal.2d at 377, 334 P.2d at 5. (See this Brief, *supra,* at 13.) Thus, far from a case in which defendant's presence would have been a mere formality and his impact on the fairness of the proceedings no more than a "shadow" (*Snyder v. Massachusetts, supra,* 291 U.S. at 105-106), respondent possessed the unfettered right to veto any order imposing probation and hence the power to dictate the outcome of the proceedings on the motion to reinstate probation. (See, this Brief *supra,* at 13-17.) Because the issuance of the reinstatement order in respondent's absence and without his knowledge thoroughly emasculated these rights, the proceedings were fundamentally unfair and violated due process of law.[21]

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[21]Indeed, given the nature of the probationary "bargain" under California law, the proposition that respondent's counsel could appear at a proceeding in his absence and accept the imposition of the probationary restraints without an affirmative showing in the record of a valid waiver by respondent, is as untenable as a suggestion that a defense attorney could validly plead his client guilty *in absentia* (and thereby waive all of his client's trial rights) on a similarly silent record. Obviously, under this Court's established precedent, such a plea could not stand. See, *Boykin v. Alabama, supra,* 395 U.S. 238; *Santobello v. New York, supra,* 404 U.S. at 261-262. Similarly, where as here the proceedings "amounted to an initial imposition of probation" (Pet.App. 8a.), the rights involved were too fundamental to be permitted to be silently and unknowingly waived. See, *Gardner v. Florida,* 430 U.S. 349, 358, 362 (1977); *Gagnon v. Scarpelli,* 411 U.S. 778, 786 (1973); *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972).

## II.

## THE EXCLUSIONARY RULE REQUIRES SUPPRESSION OF THE EVIDENCE OBTAINED BY LAW ENFORCEMENT OFFICERS DURING THE SEARCH OF RESPONDENT'S RESIDENCE.

Contrary to petitioner's assertions, this case fits within neither the rationale nor the principles of this Court's decisions in *Leon* and *Sheppard*. As the Court of Appeals recognized, the good faith exception should not be applied to a defective probation search, and even if it were applied, it could not save the instant search.

1. Petitioner concedes, as it must, that California courts independently review the reasonableness of each purported probation search, wholly apart from the validity of the underlying order. (Petitioner's Brief at 21-22.) This is because a probationer in California retains an expectation that his privacy will not be unreasonably disturbed. Thus, the search must be undertaken in furtherance of legitimate probationary objectives; there must be reasonable suspicion of a probation violation; and the search must be conducted in a reasonable manner. *People v. Guerrero, supra,* 85 Cal.App.3d at 581-582, 149 Cal.Rptr. at 560; *People v. Bremmer, supra,* 30 Cal.App.3d at 1065-1067, 106 Cal.Rptr. at 802-803. As the California courts explain, there can be no search unless the "cirmustances [indicate] that in connection with effective probation supervision [it] is advisable." *People v. Guerrero, supra,* 85 Cal.App. 3d at 581-582, 1149 Cal. Rptr. at 560; *People v. Kasinger,* 57 Cal.App.3d 975, 978, 129 Cal.Rptr. 483, 485 (1976). Such was clearly not true in this case.

Here, the officers (under the prosecutor's guidance) determined to enter respondent's residence with full

knowledge that his probation supervision had *not yet even begun.* (J.A. 76-77.) Not only had respondent never been assigned to a probation officer during the three and one-half months after his sentencing, but even at the February 27th hearing the prosecutor did not request and the Court did not order that respondent report to one. Thus, at the time of the search, respondent's supervision had never even been tried, and there was no rational basis for the assertion that a search was "advisable" to render his supervision "effective."

Similarly, it is undisputed that the reports of gun fire (which assertedly justified the search) were received several weeks prior to March 3rd, at a time when even the prosecutor was "unsure" as to whether respondent was on probation. (J.A. 46, 63.) In these circumstances, respondent reasonably believed that he was not on probation and was not subject to any prohibitions against his possession and use of firarms. Indeed, as the Court of Appeals held, respondent was not in fact on probation at the time of these complaints. (Pet.App. 6a.) See also, *In re Kennick, supra,* 128 Cal.App.3d at 1963, 180 Cal.Rptr. at 733.

Consequently, by March 3rd the gunfire reports were several weeks stale and could not reasonably support an inference that firearms were still located on the premises. More importantly, because the complaints were received at a time when respondent did not know that he was on probation (when the prosecutor was "unsure"; and when as matter of law was *not* on probation), they provided no logical basis for a belief that respondent had *violated* the conditions of his probation. Nor did these complaints indicate that respondent would fail to dispossess himself of any and all weapons (or to comply with the other terms of

probation), once apprised of the fact that he was subject to the probationary mandates. Thus, the Court of Appeals correctly determined that the search "had a motive of avoidance of Fourth Amendment requirements . . ." and was not "reasonably related to the interests of effective probation supervision." (Pet.App. 11a-13a.) See, *United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983); *People v. Guerrero, supra*, 85 Cal.App.3d at 582, 149 Cal.Rptr. at 559; *People v. Bremmer, supra*, 30 Cal.App.3d at 1064, 106 Cal.Rptr. at 801.[22]

The *Johnson* case, which is cited by the government (Petitioner's Brief at 22), is directly on point. There, the defendant had been placed on probation with the condition that he no longer associate with Bennett Brewer. *United States v. Johnson, supra*, 722 F.2d at 526. Because Brewer was defendant's then-current roommate, the court gave

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[22]Contrary to petitioner's assertions, the Court of Appeals properly seized upon the prosecutor's failure to inform Judge MARLO of either respondent's suspected activities or of her own intention to search respondent's residence, as further evidence in support of this conclusion. (See, Pet.App. 12a.) If in fact the stay had been validly lifted, then Judge MARLO was the individual who possessed the power to require respondent's supervision, to punish violations of his conditions, to modify those conditions, and to revoke probation. *In re Osslo, supra*, 51 Cal.2d at 380, 334 P.2d at 8. Thus, the prosecutor's decision to engineer the reinstatement order and then a search (but not to inform Judge MARLO of her intentions) demonstrates that she was not concerned with either respondent's rehabilitation or protection of the public, since she spurned the most efficacious means of accomplishing those ends. Her decision also confirms that in a very real sense there was a subterfuge: if the prosecutor wanted to search respondent's residence, she should have applied for a warrant. If she was concerned about respondent's performance on probation, she should have informed Judge MARLO or the probation department of her concerns so that those who were responsible for his supervision could decide what steps were appropriate.

defendant three weeks to sever relations with Brewer. *Id.* Nevertheless, eleven days later, the police searched defendant's bedroom for the purported reason that defendant had failed to comply with the probationary condition that he not associate with Brewer. *Id.* at 527. Applying California law, the Ninth Circuit Court of Appeals held that because defendant's offending conduct (i.e., association with Brewer) occurred at a time when defendant was not yet subject to that condition, the search was unreasonable and actually "frustrated the rehabilitative object of the condition." *Id.* at 528.

So too in this case. Here, the prosecutor determined that the search should go forward despite her knowledge that respondent's suspected misconduct had occurred weeks prior to his "reinstatement" on probation. Moreover, prior to commencing the search, the prosecutor knew that respondent had not been present at the February 27th proceedings, had not been aware of those proceedings, and had not authorized his counsel to appear without him.[23] Consequently, as in *Johnson*, it was not reasonable for the prosecutor to believe that a search was advisable in

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[23]These last facts demonstrate that the government's reliance on the theory that the "notice to a party's attorney should be deemed notice to the party" is thoroughly misplaced. (See this Brief, *supra*, at 23-24.) Whatever may be said concerning reasonable inferences of notice, the fact remains that respondent suffered no actual invasion of his privacy as a result of the "reinstatement" order until after the prosecutor knew that there had been a failure of notice in this case. Moreover, the government's repeated insistence that the prosecutor and officers were not obliged to trust respondent's protestations that he had received no notice of the hearing is irrelevant because it is undisputed that the prosecutor accepted the representations of respondent and his attorney but decided to search anyway. (J.A. 72-73.)

connection with respondent's effective probation supervision.[24]

Finally, the Court of Appeals' silence as to what crime "was supposedly the true object of the search" does not undermine its conclusion that the purpose of the search was not reasonably related to a probationary objective. (Compare, Petitioner's Brief at 31.) As the Court of Appeals recognized, a probation search under California law is valid only if undertaken for reasons related to legitimate probationary objectives. See, *People v. Guerrero, supra,* 85 Cal.App.3d at 581-582, 149 Cal.Rptr. at 560. Where a search is not so related, and particularly where, as here, the search is accomplished without the guidance or suggestion of a probation officer, it may fairly be presumed that the search was undertaken for other law enforcement purposes or for harassment. *Id.* See also, *In re Martinez,* 1 Cal.3d 641, 646-647, n.6, 463 P.2d 734, 737, 83 Cal.Rptr. 382, 385-386 (1970); *People v. Kern, supra,* 264 Cal.App. 2d at 964-965, 71 Cal.Rptr. at 106-107. While there was evidence in the record suggesting a subterfuge for a narcotics investigation, a finding on that question by the

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[24]The fact that the search in *Johnson* was also undertaken prior to the effective date of the "disassociation" probationary condition is a distinction without a difference. There can be no doubt that regardless of when the search occurred, it would have been unreasonable if undertaken to investigate conduct which allegedly violated a probationary condition and which had occurred at a time when that condition was not in effect. Surely, if the officers in *Johnson* had first "engineered" an advancement of the effective date of the "disassociation" condition without actual notice to the defendant and then had searched (as the prosecutor did here), their conduct would still have been thoroughly unreasonable.

Court of Appeals was immaterial to its holding that the case did not arise from a valid probation search.[25]

2. After a cautious and painstaking cost-benefit analysis, this Court fashioned the good faith exception to the exclusionary rule in search warrant cases and expressly limited the exception to that unique context. *United States v. Leon, supra,* 468 U.S. at 921. Because in such cases the judgment of a neutral and detached magistrate is interjected between the investigating officers and the decision to search, the Court recognized that the exclusion of evidence where law enforcement officers reasonably relied in good faith "on a subsequently invalidated warrant" would not further the deterrent rationale of the rule. *Id.* at 919-920. Moreover, the application of a good faith exception in that context has the salutary effect of encouraging police to heed the courts' "strong preference" for the procurement of search warrants. *Id.* at 914.

By contrast, there is no similar judicial policy favoring advance consent searches. Quite to the contrary, the courts are wary of such waivers and rigorously scrutinize the purported basis for them to assure that the defendant's right are not inadvertently or unknowingly forfeited. (See this

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[25]The record demonstrates that the very law enforcement personnel who conducted the search had been involved in a drug-related criminal investigation of respondent. (Pet.App. 12a-13a.) On at least one recent occasion, the prosecutor and another member of the search party who was a narcotics investigator had gone to respondent's property to investigate a tip that he was cultivating marijuana. (J.A. 163, 167-168.) This evidence supports the suggestion of a possible subterfuge, as does the prosecutor's conduct in filing a motion to reinstate probation rather than applying for a warrant, when her express purpose was to search respondent's residence. (See this Brief, *supra,* at 3.)

Brief, *supra*, at 13-16.) Any rule which permitted law enforcement officers to insulate their decision to conduct such searches on the grounds that *their* interpretation and reliance on a probation clause or other advance waiver was "reasonable" would seriously undermine *this* policy. At the same time, such a rule would actually frustrate the policy favoring the procurement of search warrants in all cases where the police officers believe that an advance waiver might arguably justify the intrusion.

Similarly, unlike search warrant cases, the decision to undertake an advance waiver search does *not* involve the judgment of a judicial officer. Instead, in most instances the police officers rely upon an order which predates the search, frequently by months or even years, for authority which they independently determine is applicable to the particular situation. Moreover, as distinguished from the search warrant context, in California and other states which do not require that the probation officer participate in the search, those who actually execute an advance consent search will frequently have had no involvement in the procurement of the underlying court order and therefore will have no personal knowledge concerning the regularity of the proceedings in which it was entered.[26]

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[26]Petitioner contends that as in the warrant context, an officer relying on a probation order cannot "reasonably be expected to question the judicial officer's judgment that the order is legally sound." (Petitioner's Brief at 25.) However, this is the crucial distinction between the two situations. Most often a much more substantial period of time elapses between the issuance of a probation order and the decision to search, than is true in warrant cases. See, e.g., Rule 41(c)(1) Fed. Rules Crim. Pro. (providing for a maximum period of ten days). Consequent-

(Continued on following page)

Taken together, these factors introduce in advance consent cases greater uncertainty as to the validity of the judicial authority, while vesting greater discretion in the police for determining whether a search is appropriate, than exists in search warrant cases. As a consequence, the objective reasonableness of the officers' conduct is a more elusive and less easily administered standard in the probationary context, and there is an unacceptable risk that deterrable intrusions will go undetected and unremedied. Accordingly, the good faith exception to the exclusionary rule should not be adopted in the context of advance consent searches.

3. The record fully supports the Court of Appeals' conclusion that the officers in this case did not possess an objectively reasonable belief in the validity of the search clause.[27] First, after the initial sentencing hearing, the officers knew that although respondent had been sentenced to formal probation, he was never placed under supervision or referred to the probation department.[28] Moreover, de-

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(Continued from previous page)

ly, there may be changes in the circumstances or in the law during the intervening period which render the probation order invalid or unreasonable. In such situations, the executing officers would not rely on any legal ruling that was actually made (or considered) by the judge, and thus the rationale for the good faith exception is not applicable. See, *United States v. Leon, supra,* 468 U.S. at 919-921.

[27]For this reason, even if the Court were inclined to consider extension of the good faith exception to searches based on defective probation orders, this is not an appropriate case.

[28]Because the local prosecutor was the motivating force for the search and was in fact the individual who finally determined at respondent's residence that the search should go forward, she was undeniably a member of the law enforcement team and her knowledge must be attributed to all of the executing officers. See, *United States v. Leon, supra,* 468 U.S. at 921 at n.24. The government does not contend otherwise.

spite respondent's failure to report to a probation officer, there had been no effort to "revoke" his probation.[29] Instead, when the gun fire complaints were received, the prosecutor expressed to the officers her good faith *doubts* that respondent was in fact on probation. (J.A. 46, 63.) Subsequently, when a hearing was held on her motion, the prosecutor's doubts were confirmed by Judge MARLO who ruled that probation was now "reinstated." (Pet.App. 22a.)

In these circumstances, the prosecutor should not be lauded for restraining herself from ordering a search of respondent's residence immediately upon learning of the gunfire complaints. (Compare, Petitioner's Brief at 26-27.) Had she done so, the search would have been blatantly unconstitutional and the prosecutor's subjective *bad faith* would have been unequivocally established since she admitted that she was "unsure" as to respondent's probationary status. (J.A. 46, 63.) Her failure to act "precipitiously" to order an illegal search of respondent's residence is therefore irrelevant to the question of her objective good faith when she did so a few weeks later.

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[29]The government's attempt to deflect the significance of these points is specious. True, a court's failure to require supervision of a probationer does not defeat the validity of the judgment. (Petitioner's Brief at 31-32, n.19.) Here, however, supervision *was* required and it was the failure of the probation department to provide it which demonstrates that all concerned parties believed probation to have been stayed. (J.A. 89.) Similarly, the government accurately notes that the probation department is authorized to determine the *level* of supervision that is necessary for a particular individual. Cal. Penal Code § 1202.8. Nevertheless, it is the court which determines whether there will be supervision. *In re Osslo, supra,* 51 Cal.2d at 380, 334 P.2d at 8. Thus, the probation department's decision not to provide *any* supervision "pending the appeal outcome" contradicts any assertion that respondent was on probation. (J.A. 89.)

Similarly, the officers in the search party were fully aware of the inadequacies of the February 27th proceedings. The prosecutor who led the search, and who had personally engineered that hearing for the purpose of conducting the warrantless search, also knew that respondent had not been present in court. However, as a prosecutor in California courts, she was certainly charged with knowledge of Penal Code § 977(a) and of the state law requirements for a criminal defendant's effective waiver of his right to be present. (See this Brief, *supra*, at 19-20.)[30] The officers' concerns in this regard is manifest in their willingness to engage respondent in "quite a lot of conversation" before entering the premises. (J.A. 71.)

More fundamentally, prior to her final approval of the commencement of the search, the prosecutor learned from respondent's attorney that respondent had in fact received no notice of the February 27 hearing and order. The prosecutor was thereby alerted to a constitutional infirmity in the "reinstatement" order which had not been known to Judge MARLO at the time of those proceedings. Moreover, despite the government's assertion that the officers were entitled to disregard respondents claims,[31] the

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[30]Perhaps the prosecutor was subjectively unaware of these requirements, because she had been with the office for a very short time. (J.A. 166.) If so, however, such ignorance would not render her conduct objectively reasonable.

[31]The government's good faith argument is premised on the contention that the executing officers were not compelled to believe respondent's statements concerning the lack of actual notice. (Petitioner's Brief at 28-29.) However, there is nothing in the record to support the proposition that the officers did not accept those representations. To the contrary, respondent's statements were corroborated by the prosecutor's knowledge that respondent had been present in court at the reinstatement hearing. Moverover, the record demonstrates that the prosecutor believed or assumed that a failure of actual notice had occurred, but determined to search anyway. (J.A. 72-73.)

prosecutor discussed the legal implications with respondent's counsel and concluded with her opinion that "in a misdemeanor matter, an attorney's actions are binding on his client." (J.A. 72.) Moments later, the prosecutor spoke with Judge MARLO himself who, having been apprised for the first time of respondent's lack of notice of the February 27th proceedings, declined to place his authority behind the search. (J.A. 74-75.) Nevertheless, despite their awareness of this express ambivalence from the only individual who was authorized by California law to require respondent's supervision, the prosecutor ordered that the search begin and the officers carried it out.[32]

These facts carry this case far beyond the *Leon* rationale. As this Court explained, that decision was founded on the proposition that law enforcement officers cannot reasonably be expected to question a judicial officer's conclusion that a warrant authorizing a search is legally sound. *United States v. Leon, supra,* 468 U.S. at 920-921. Where police officers submit such a legal question to a judge or magistrate, there is "literally nothing more [they can] do in seeking to comply with the law." *Id.* at 921.

Here, by contrast, the prosecutor and officers confronted legal issues which they knew had neither been presented to nor considered by Judge MARLO. Undisputably, the prosecutor made an independent legal judgment as to the authority for a search with knowledge of facts

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[32]Somewhat remarkably, the government now suggests that Judge MARLO's comments support a finding of objective reasonableness because the judge did not tell them that their search was unreasonable. (Petitioner's Brief at 29.) However, the conversation merely confirms that there were substantial reasons to doubt the validity of the probation order, that the search party possessed subjective concerns in this regard, and that they proceeded without judicial authorization.

and circumstances which had not been available at the time of the "reinstatement" hearing. Thus, in making the final decision to commence the search, the prosecutor and officers were not relying on any ruling of Judge MARLO, but were instead determining the appropriateness of a search by application of their own understanding of what the law required. This is precisely what occurs in every warrantless search, and *Leon* is therefore inapposite. See, *Leading Cases of the 1983 Term,* 98 Harv.L.Rev. 87, 114-118 (1984).

To summarize, the decision to proceed with the search on the facts of this case belies any assertion of objectively reasonable reliance on the February 27th order. Impetus for the search having arisen from suspected conduct predating the "reinstatement" order by several weeks, the search was conducted despite the officers' knowledge that respondent had received no opportunity whatsoever to conform his behavior to the probationary conditions by reason of a failure of actual notice to him. By petitioner's own admission, the officers undertook the search to determine whether respondent had firearms, but with the knowledge that respondent had never been told that he could not lawfully possess them. Thus, the prosecutor and officers knew of the fatal deficiencies in the probation order prior to commencing the search; and objectively reasonable officers should have realized that a warrantless

search under its tarnished authority was both unreasonable and fundamentally unfair.[33]

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## CONCLUSION

The judgment of the Court of Appeals should be affirmed. Dated: October 6, 1986.

Respectfully submitted,

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[33]Because this case arose prior to this Court's decision in *United States v. Leon, supra,* 468 U.S. 897, the district court did not hold a "good faith" hearing. Instead, the court relied on the rationale that had been enunciated in *United States v. Williams,* 622 F.2d 830, 840 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127 (1981), without an evidentiary hearing focusing on the good faith issue. Accordingly, if this Court were to conclude that an objective good faith exception might arguably apply to this case, the matter should be remanded to the district court for a hearing at which the facts relevant to a good faith analysis under *Leon* could be developed and applied.

Supreme Court, U.S.
FILED
OCT 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1672.

# In the Supreme Court of the United States.

OCTOBER TERM, 1986.

UNITED STATES OF AMERICA,
PETITIONER,

*v.*

WILLIAM D. MERCHANT,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 4,000 lawyers, including representatives of every state. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence, and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual

rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional protection of an individual's Fourth Amendment rights. NACDL is very concerned about any decision that would further undermine this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that NACDL should offer its assistance to the Court.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members

dedicated to protecting and preserving the liberties safeguarded by the Constitution and the Bill of Rights. The prohibition against unreasonable searches and seizures contained in the Fourth Amendment is critically important among those safeguards. The ACLU has participated in many of the leading cases in which this Court has given shape and content to the Fourth Amendment's guarantee. In Mapp v. Ohio, 367 U.S. 643 (1961), the ACLU filed the only brief before the Court urging application of the exclusionary rule to the states, and was permitted by the Court to raise the point at oral argument. 367 U.S. at 646 n.3. The ACLU appeared as amicus curiae in Illinois v. Gates, 462 U.S. 213 (1983) and United States v. Leon, 468 U.S. 497 (1984), and represented the defendant in Massachusetts v. Sheppard, 468 U.S. 981

(1984). The ACLU appears here again because of its belief that it is crucial to limit the application of the good faith exception only to searches pursuant to a warrant.

## SUMMARY OF ARGUMENT

The government urges this Court to extend the "good faith" exception to the Fourth Amendment's exclusionary rule of United States v. Leon, 468 U.S. 897 (1984), to a warrantless search allegedly conducted as a probation search.[1] While amici and others have raised concerns about the impact of the good faith exception to the exclusionary rule many

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[1] While we support the due process claims of the respondent, that a defendant may not be subject to a warrantless search conducted pursuant to a probation condition that was imposed in his absence, without his knowledge and without his consent, amici will address

times during the past several terms of this Court, there can be no doubt that these concerns apply with special significance to extending the exception to warrantless searches. Indeed, we believe that this is perhaps the least appropriate case in which to consider extending the good faith exception; the application of a good faith exception in this case would be contrary to the rationale of Leon and would substantially dilute the protections of the Fourth Amendment.

The first question to be addressed is whether, as the Ninth Circuit found, law enforcement officials used a probation search as a pretext for conducting a warrantless search. The second question is whether, assuming the officers intended to conduct a warrantless probation

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only the Fourth Amendment issues.

search, but failed to comply with its requirements, their conduct should somehow be excused as having been in "good faith" within the meaning of Leon.

As to the first issue, whether this was a law enforcement search, this case raises no new legal issues. The Ninth Circuit's decision fits within well-established decisional law which already takes into account the Court's concerns with reasonable police behavior and the exigencies of criminal and administrative investigations. Numerous cases have recognized that government officials, like probation officers, arson investigators, or building inspectors, may have a right to conduct warrantless searches of a citizen's home or business for some purposes and under specified conditions, but are held to the full rigors of the Fourth Amendment when they search with

law enforcement motives.

Nor does this case raise any unique factual problems. This Court has never had any difficulty in sorting out proper administrative searches from improper or pretextual law enforcement searches, and this case presents none. It was a search conducted exclusively by law enforcement officers, for law enforcement purposes, without consultation with, or participation by, probation officers.

With respect to the second issue, even if this Court agrees that the officers attempted a probation search, but erred with respect to whether or not the defendant had proper notice of the conditions of his probation, it should not extend Leon. Leon legitimized the conduct of an officer who had consulted with a neutral magistrate, presented the facts of his investigation which he

believed provided probable cause for a particularly described search, and received the magistrate's imprimatur. The extension the government urges would excuse the conduct of an officer who opted to invade a citizen's privacy without any prior judicial screening of the basis for, or the scope of, a particular search. Excusing good faith mistakes about probable cause, where the law enforcement officer has obtained a warrant, has a far less dramatic impact on personal privacy than excusing mistakes about whether to obtain a warrant in the first instance.

The government's claim that seeking judicial clarification of the defendant's probationary status was the equivalent of the actions of the Leon officers in securing a warrant is totally disingenuous. This "judicial clarification"

process was far from the equivalent of a warrant review. It did not deal with the proposed search at all. The officers sought only a determination that respondent was, in fact, on probation. While they had decided to search if the court held that he was on probation, they never bothered to disclose that fact to the judge. Nor did they apprise the judge of their suspicions that respondent was violating the terms of his probation. Rather, they found an exception to the warrant requirement, sought judicial approval that the exception applied (without disclosing their motives), and used it as a pretext to conduct a warrantless search. If the Court labels government efforts to obtain this kind of perfunctory approval "good faith", and equivalent to the good faith of the officers in Leon who sought a warrant for

the particular search they wished to conduct, it will be trivializing the warrant process.

The dangers to the ability of courts to deter Fourth Amendment violations if Leon is extended to warrantless searches cannot be overstated. A new excuse for constitutional violations, perhaps more egregious than the violation in Leon, would be created--that an officer made a reasonable mistake about whether his conduct fit within an exception to the warrant requirement. The likely result is that the numbers of warrantless searches would increase and the central protection of the Fourth Amendment would be undermined.

Amici are particularly troubled about the impact on the development of the decisional law if Leon is extended to warrantless searches. While it had been

argued that Leon would have an adverse effect on decisional law regarding probable cause, there is no doubt that the impact on the law of warrantless searches would be even more substantial. It is critically important that judges delineate with precision the bright-line categories defining when a warrant is constitutionally required. Since the finding of "good faith" mistake in failing to obtain a warrant could obviate the need to determine whether the officer's conduct was constitutionally permissible, there will necessarily be less incentive for courts to precisely define the narrow and limited exceptions to the warrant requirement.

Moreover, there is no need for a good faith exception to the warrant requirement to address the Court's concerns. The existing exceptions to the

warrant requirement already permit courts to take into account the reasonable needs of law enforcement, the exigencies of a criminal investigation, and even the perceptions of officers in the field.

In sum, we believe the harm to the privacy rights of citizens that would result from expanding the "good faith" exception to warrantless searches would be incalculable and the government's effort to do so here should be rejected.

## ARGUMENT

### I. THE SEARCH OF THE RESPONDENT'S HOME WAS A LAW ENFORCEMENT SEARCH USING A PROBATION SEARCH AS A PRETEXT; IT WAS CONDUCTED WITHOUT PROBABLE CAUSE, WITHOUT A WARRANT, AND OUTSIDE THE SCOPE OF ANY EXCEPTION TO THE WARRANT REQUIREMENT

The government has argued that the warrantless search of respondent's home was a probation search undertaken in good faith. The Ninth Circuit disagreed, concluding that the officers used

respondent's probation status as a pretext for an unconstitutional law enforcement search. United States v. Merchant, 760 F.2d 963, 969 (9th Cir. 1985). In effect, whether or not respondent was in fact on probation at the time of the warrantless search is irrelevant. Whatever limited rights a probationer may have vis a vis probation officers, he has the full panoply of Fourth Amendment rights vis a vis law enforcement officers and any other officials who are acting outside the needs of the probation system. United States v. Johnson, 722 F.2d 525, 527 (9th Cir. 1983); United States v. Gordon, 540 F.2d 452, 453-54 (9th Cir. 1976). See generally 3 LaFave, Search and Seizure, Sec. 10.10, at 435-443 (1979).

A. The Ninth Circuit decision fits within the existing framework of decisional law concerning administrative searches, a framework which appropriately balances the needs of law enforcement and administrative agencies against the constitutional rights of individuals

Although this Court has never addressed warrantless searches of probationers, its decisions in cases involving regulatory searches provide a framework to analyze this case, one which already takes into account the circumstances of the search, including the officer's motives and the legitimate needs of law enforcement.[2]

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[2] Respondent argues that, as a matter of state law, the search conducted by law enforcement officers here, wholly without the participation or knowledge of the probation authorities, was not a probation search. However, whether or not California law specifically prohibits law enforcement officers from conducting warrantless searches under the instant circumstances, federal constitutional law, as Section I demonstrates, clearly

1. Law Enforcement Motive

Warrantless searches undertaken by officials for the purpose, not of supervising probation,[3] but rather of investigating criminal behavior, violate the probationer's right to be free from unreasonable searches and seizures. United States v. Johnson, supra; United States v. Hallman, 365 F.2d 289 (3rd Cir.

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does. The state could no more authorize every law enforcement officer to conduct warrantless searches of any and all probationers than it could authorize every law enforcement officer to conduct warrantless searches of business premises. Any such authorization would necessarily be bound by the limits of the Fourth Amendment.

[3] Although a number of the cases cited herein address the rights of parolees, they are used interchangeably with probation cases since "there is no difference between the constitutional status of probationers and parolees." Owens v. Kelley, 681 F.2d 1362, 1367 n. 8 (11th Cir. 1982), reh. den., 697 F.2d 1094 (1983), citing Gagnon v. Scarpelli, 411 U.S. 778 (1973).

1966). Although the probation officer's dual function of rehabilitating the probationer and protecting society may, under strict limitations, empower him to conduct searches outside the usual Fourth Amendment strictures,[4] this special power is necessarily limited by the extent to which probation imposes special restraints on the permissible activity of

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[4] A substantial minority of courts have held that although there may be a reduced burden for the issuance of a warrant, "a probation officer is required to obtain a warrant prior to conducting a search of a probationer's home unless the search falls within a judicially recognized exception to the warrant requirement." United States v. Rea, 678 F.2d 382, 388 (2d Cir. 1982); United States v. Workman, 585 F.2d 1205, 1207-1208 (4th Cir. 1978); People v. Jackson, 412 N.Y.S.2d 884, 887, 46 N.Y.2d 171 (1978).

the probationer.[5] While probationers

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[5] Two theories have been used to justify unlimited warrantless searches of probationers and parolees. The first, the "constructive custody" theory of probation and parole, held that such massive invasions of privacy were possible because probationers were entitled to no more constitutional protection than prisoners. White, The Fourth Amendment Rights of Parolees and Probationers, 31 U. Pitt. L. R. 167, 175-81 (1969). See also People v. Mason, 5 Cal.3d 758, 97 Cal. Rptr. 302, (1971). However, reliance on this theory to deny constitutional protections was vigorously attacked by the commentators, see, e.g., 3 LaFave, supra, at 423-425; White, supra at 180; Note, 22 Stanford L. Rev. 129, 133 (1969), and has been generally rejected by the courts. See Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (extending Morrissey to probationers); People v. Burgener, 41 Cal. 3d 505, 224 Cal.Rptr. 112, 126-28 (1986). See also United States v. Bradley, 571 F.2d 787, 789 (4th Cir. 1978); United States v. Consuelo-Gonzales, 521 F.2d 259, 263 (9th Cir. 1975). The other theory used to justify searches of probationers and parolees is the assertion that these citizens waive their Fourth Amendment rights by accepting the conditions of their release. See 3 LeFave, supra, at 426-431. While this theory must be understood in the light of subsequent

may lose some of their Fourth Amendment protection with respect to searches pursuant to the conditions of their release, they are entitled to all constitutional safeguards vis-a-vis government officials acting with law enforcement motives. Latta v. Fitzharris, 521 F.2d 246, 250-51 (9th Cir. 1975); People v. Way, 319 N.Y.S.2d 16, 65 Misc. 22665 (Sp.Term.

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cases, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (waiver of constitutional right must be knowing and voluntary); United States ex. rel. Coleman v. Smith, 395 F.Supp. 1155 (W.D.N.Y. 1975), the issue is irrelevant. Whatever this Court's determination as to respondent's probationary status on the date of the search, there is no question, as the government concedes, that respondent did not know that he was on probation at the time. Thus, he could not possibly have consented to the specific term of his probation that he submit to warrantless searches at any time. Cf. Freytas v. Superior Court, 60 Cal.App.3d 958, 132 Cal.Rptr. 26 (1976).

1971).[6] Warrantless searches which are not undertaken for probation purposes simply cannot pass constitutional muster. United States v. Scott, 678 F.2d 32, 34 (5th Cir. 1982), reh. den., 683 F.2d 1373; United States v. Consuelo-Gonzalez supra; State v. Griffin, 131 Wis. 41, 388 N.W.2d 535, 540-46 (1986).[7]

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[6] As the Court noted in New Jersey v. T.L.O., ___U.S.___, 105 S.Ct. 733, 745 (1985):

> [T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicitly in enforcement of the criminal law.

[7] Although some courts in the past had concluded that a probationer had a lesser constitutional interest in his privacy than the ordinary citizen, see e.g.,

This Court has so held in a number of other administrative settings. In Michigan v. Clifford, 464 U.S. 287 (1984), the Court addressed the admissibility of evidence discovered in a warrantless search of a burned building

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People v. Mason, supra, this approach confuses the right of the probationer to be free from unreasonable government invasions of his privacy with the reasonableness of the government's actions in intruding on privacy under certain circumstances. The question is not whether a probationer's Fourth Amendment rights are diminished in some abstract way because of his status as "a probationer," but whether, despite probationer's constitutional interest in privacy, the government's needs with respect to supervising him during probation justify certain intrusions into his privacy that would not be permissible in the case of an ordinary citizen. See United States v. Scott, supra, 678 F.2d at 34-35; Owens v. Kelley, supra, 681 F.2d at 1366-9; 3 LaFave, supra, at 431. Cf. Donovan v. Dewey, 452 U.S. 594 (1981) (warrantless investigatory search of mines constitutional because of needs of regulatory system for quick and frequent inspections); Camara v. Municipal Court, 387 U.S. 523 (1967).

after the cause of the fire had already been determined. In suppressing the evidence, the Court found that the officials' objective in undertaking a warrantless search was critical to its validity.

> "The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined. If, for example, the administrative search is justified by the immediate need to ensure against rekindling, the scope of the search may be no broader than reasonably necessary to achieve its end. A search to gather evidence of criminal activity not in plain view must be made pursuant to a criminal warrant upon a showing of probable cause."

Id. at 294-295.[8]

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[8] See also, Michigan v. Tyler, 436 U.S. 499, 511 (1978) ("[W]e hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. There-

Implicit in the cases upholding warrantless searches as part of an administrative scheme is the necessity for careful judicial scrutiny of the motives of the searching officials. Because warrantless administrative searches can only satisfy constitutional mandates if they are "essential" to the enforcement of the regulatory scheme, United States v. Biswell, 406 U.S. 311, 316 (1972), Hudson v. Palmer, __U.S.__, 104 S.Ct. 3194, 3201 (1984), and "specifically tailored to address [its] concerns," Donovan v. Dewey, supra, 452 U.S. at 603, the court must determine whether the searches were conducted solely for the administrative purposes for which they

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after, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches.") (Emphasis added).

were sanctioned. Otherwise, the "authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers" Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978).[9] See United States v. Jarrad, 754 F.2d 1451, 1455 (9th Cir. 1985); cert. den., ___U.S.___, 106 S.Ct. 96; Owens v. Kelley, supra, 681 F.2d at 1369; United States v. Consuelo-Gonzales, supra, 521 F.2d at 267.

That the concerns of the administrative officer with broader search powers may occasionally overlap those of the police officer is not determinative. In-

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[9] See also, United States v. Lawson, 502 F.Supp. 158, 165 (D.Md. 1980) ("Once the purpose shifts from administrative compliance to a quest for evidence to be used in a criminal prosecution, the government may constitutionally enter the premises only upon securing a warrant supported by full probable cause.").

deed, in most of the administrative search cases the law enforcement officer and the administrative official shared the same concerns.[10] This suggests that the Court must carefully analyze the objective circumstances of the search (including those discussed below) and not accept at face value the law enforcement officer's claimed administrative purpose.

Finally, that in some cases it may be difficult to parse out the official's

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[10] In some cases, the administrative official is searching for information of value in the criminal investigation as well. For example, information bearing on the goal of an arson prosecution was also relevant to the arson investigator's goal of finding the cause of the fire in Michigan v. Tyler, supra; information bearing on drug offenses was also relevant to the school officials' goal of disciplining students in New Jersey v. T.L.O, supra. Alternatively police officers may argue, as do petitioners here, that they have a general interest in seeing to it that all rules, including probation rules, are obeyed.

true purposes does not affect the instant case. There is no such problem here; the facts are clear. (See section I(C)).

2. Absence of Probation Officer Approval, Participation, or Supervision

Quite apart from the purpose of the search, warrantless searches of probationers conducted by police without the authorization, supervision or participation of a probation officer, as here, plainly infringe on probationers' constitutional rights. E.g. United States v. Consuelo-Gonzales, supra, 521 F.2d at 266; State v. Fogarty, 187 Mont. 393, 610 P.2d 140 (1980). Neither the special needs of the probation system, nor the special relationship between the probation officer and the probationer -- the two factors which together have been held to validate warrantless probation searches in certain contexts, United

States v. Thomas, 729 F.2d 120, 123 (2d Cir. 1984), cert.den., ___U.S.___, 105 S.Ct. 158 -- can possibly justify the invasion of constitutional rights which flows from permitting any law enforcement official, acting wholly outside the probation system, to conduct a warrantless search merely because of a person's status as a probationer.

Thus, whether, as a matter of state law,[11] police officials may assist a probation officer in conducting a warrantless search, or may undertake a search with the probation officer's authorization but in his absence, is not determinative. If such a search is to withstand a constitutional challenge, the supervising probation officers must participate in a fashion sufficient to

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11 See fn. 2.

justify the special incursions on the probationer's Fourth Amendment rights. United States v. Scott, supra; United States v. Consuelo-Gonzales, supra, 521 F.2d at 266 (invalidating search of probationer by law enforcement agents because although "[p]robation authorities...have a special and unique interest in invading the privacy of probationers, [t]his special and unique interest does not extend to law enforcement officers generally").[12] United States v. Whiting, 781 F.2d 692, 696 (9th Cir. 1986) ("A warrantless border search is valid only if conducted by officials specifically authorized to conduct such

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12 See also Wood v. State, 378 So.2d 110 (Fla. App. 1980); State v. Bollinger, 169 N.J.Super. 553, 405 A.2d 432 (1979); State v. Age, 38 Or.App. 501, 590 P.2d 759 (1979); Grubbs v. State, 373 So.2d 905, 909 (Fla. App. 1979).

searches.").

While a probationer may feel intruded upon when a probation officer whom he knows and presumably trusts comes to the door and asks to have a look inside the house, that cannot compare to the feelings of fear and helplessness which result when a number of armed and unknown law enforcement officials present themselves and demand entrance. Lacking the warrant which tells the citizen that there is a judicial officer who is aware of what is happening and who has authorized, and limited the scope of the invasion, such intrusions are bound to instill terror in the individual, his family and his friends present at the search. Extending that authority to an unlimited multitude of government officials would violate sacred principles at the core of the Fourth Amendment's

historic function.

B. The Ninth Circuit's conclusions that the instant search was a law enforcement search, using the probation rationale only as a pretext, should be sustained

By every measure, the search conducted by the officers in this case was a law enforcement search masquerading as a probation search, as the Ninth Circuit found. There was no special probation purpose for this search. Moreover, none of the justifications for probation searches applied. It was not a search legitimized by the "special needs" of the probation system or the "special relationship" of the probation officer to the probationer.

Respondent was never assigned a probation officer. The state made no efforts to rehabilitate, counsel or supervise his activities. The assistant district attorney, after receiving

reports of gunfire on respondent's property, did not contact the probation department. Rather, without informing the court of respondent's suspected activity, or of her earlier conversations with law enforcement officers about conducting a search of respondent's residence, or of her plans to search if the court announced respondent was on probation, she appeared before the sentencing judge on a motion for clarification or modification of respondent's probation. The search followed on the heels of the court's order. It was conducted entirely by law enforcement officers without consultation with, or the participation of, probation officers.

In a warrantless search the government has the burden of justifying its failure to obtain a warrant. E.g.,

Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971). It is apparent that on these facts it cannot. The government's suggestion that this had to be a probation search since the searching officers had no information that a crime under California law had been committed is insufficient.[13] If the police officers knew nothing about respondent, except that there were reports of gunfire on his property, they would have been warranted in investigating further for possible criminal violations. Hearing a gun discharge could raise the suspicion of criminal gun violations or, for that

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13 The officers had heard reports that a gun had been discharged on respondent's property. Since it was not a crime for an individual to have a gun, unless that individual had been convicted of a felony and, as of that moment, respondent had not, the only offense, they maintain, was a probation offense.

matter, suspicions about a host of other offenses, including murder. To say that a law enforcement investigation begins only the moment a fully formed crime is known to have occurred is nothing short of absurd.

Indeed, it was precisely because the officers did not have sufficient evidence of a criminal offense to seek a warrant that they sought to use respondent's probation status. If they had considered this to be a law enforcement investigation, they would have been required to refrain from searching until further investigation produced evidence meeting the probable cause standard and to obtain a warrant. Rather than taking the constitutional path, they looked elsewhere for pretexts. The fact that respondent might have been on probation was fortuitous since it meant that

respondent would be subject to rules far more elaborate than those in the criminal code.

However, the Constitution expressly bars a law enforcement officer from taking advantage of a probationer's status in just this fashion, namely as a pretext to avoid the rigors of the Fourth Amendment.

## II. THIS COURT SHOULD NOT EXTEND LEON TO WARRANTLESS SEARCHES

United States v. Leon, supra, and Massachusetts v. Sheppard, supra, announced an exception to the exclusionary rule for evidence obtained during unconstitutional searches in which police reasonably rely on a warrant. The government now asks this Court to extend that "good-faith" exception to warrantless searches. We urge this Court to reject that extension.

First, the rationale of Leon and Sheppard does not apply to warrantless searches: The premise of Leon and Sheppard is that the "deterrence objective" of the exclusionary rule is not furthered where an officer has reasonably relied on a warrant. At the same time, the cost to individual privacy is diminished, the Court found, where a magistrate has reviewed the basis for the search.

The balance is totally different where the officer has avoided the warrant requirement. Wrongfully searching without a warrant can be effectively deterred by sending a strong message that warrantless searches will be tolerated only under limited and carefully scrutinized circumstances. Moreover, the costs to personal privacy are substantial whenever the police intrude upon a person's home

without prior judicial approval.

Second, the law concerning exceptions to the warrant requirement already takes into account this Court's concerns with the needs of law enforcement and the deterrence of unreasonable police conduct. Creating a new excuse for a constitutional violation -- where an officer claims to have made a "reasonable" mistake about whether one of the "reasonable" exceptions to the warrant requirement applied to his conduct -- would dramatically and unnecessarily dilute the Fourth Amendment.

Third, there is perhaps no area of Fourth Amendment jurisprudence in which clear and precise judicial rulemaking is more necessary than in the decisional law defining the exceptions to the warrant requirement. A good faith exception for a warrantless search will discourage

courts from considering whether police conduct fits within an exception to the warrant requirement. The principle focus will shift to whether the officer made a reasonable mistake in concluding that his conduct fell outside the warrant requirement, rather than whether the conduct violated constitutional strictures.

A. Leon and Sheppard Are Inapplicable to Warrantless Searches

The warrant requirement is at the heart of this Court's analyses in Leon and Sheppard. The Court reiterated the Constitution's strong preference for the warrant as a more reliable safeguard to privacy than the hurried judgment of line officers involved in criminal investigations. United States v. Leon, supra, 468 U.S. at___, 104 S.Ct. at 3417. Indeed, the Court described its decision as the "good faith exception for searches

conducted pursuant to warrants." Id. at 3427.

When the Court balanced costs against benefits, it concluded that a good faith exception was justified in warrant searches because applying the exclusionary rule in that limited class of cases would impair society's quest for truth without a concomitant benefit to the effectuation of Fourth Amendment guarantees. There is no deterrence interest, the Court concluded, when police officers are behaving in objectively reasonable reliance on the legal determination of a magistrate.[14] In

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14 As the Court stated:

> This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus

effect, where the officer did all that he could reasonably be expected to do by securing a warrant, he cannot be faulted, with certain exceptions,[15] when the

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> nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. [O]nce the warrant issues there is literally nothing more the policeman can do in seeking do to comply with the law. [citations omitted]"

United States v. Leon, supra, 468 U.S. at __, 104 S.Ct. 3420. See also, Id., 468 U.S. at __, 104 S.Ct. at 3450 (Stevens, J., concurring in part and dissenting in part). Indeed, the Court essentially defined objectively reasonable behavior in terms of the officer's efforts to secure a warrant.

[15] There are a few exceptions: 1) where the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,"; 2)

warrant is subsequently invalidated. At the same time, because the officer sought the intervention of a magistrate prior to a search, the Court can be reasonably confident that an officer's behavior will not seriously undermine privacy rights. Indeed, the opinions suggest that failure to apply a good faith exception to warrant searches could well have tne undesirable effect of discouraging resort to warrants. United States v. Leon, 468 U.S. at ___, 104 S.Ct. at 3417 ("the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination"), quoting Spinelli v.

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where the warrant was based on an affidavit the affiant knew to be false; 3) where the issuing magistrate abandoned his judicial role; 4) where in certain circumstances the warrant was clearly facially deficient. United States v. Leon supra, 468 U.S. at ___, 104 S.Ct.

United States, 393 U.S. 410, 419 (1969).

Where the Court concludes that a police officer wrongfully conducted a warrantless search, the same analysis leads to a completely different conclusion. Warrantless searches "are per se unreasonable -- subject only to a few specifically established and well-defined exceptions." Katz v. United States, 389 U.S. 317, 337 (1967). Accord Thompson v. Louisiana, 496 U.S. 17 (1984). The police officer who decides to conduct a warrantless search has not done all that "he can do in seeking to comply with the warrant [requirement]." United States v. Leon, supra, 468 U.S. at __, 104 S.Ct. at 3420. Instead, he has unilaterally chosen to disregard the constitutionally prescribed course for the approval of a

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3421-3422.

search.

Deterrence of similar future errors will be effectuated by excluding the fruits of his error. On the one hand, where the law is clear that a warrant is required, the officer's conduct could not be characterized as "good faith" and there can be no dispute that deterrence requires exclusion. On the other hand, where the law is ambiguous, or unsettled, or the facts unclear, the Constitution compels the officers to "err on the side of constitutional behavior" by obtaining a warrant. United States v. Johnson, 457 U.S. 537, 561 (1982). Exclusion is likewise essential to encourage "erring" on the side of warrants.

Creating a good faith exception for warrantless searches would have precisely the opposite effect of that sought by the Court in Leon. It would provide added

incentives for law enforcement officers to avoid a warrant and take their chances that a court will subsequently label their actions "good faith." An important commentator on the Fourth Amendment explains:

> [P]erhaps of ultimate importance, there is the fact that a broader good faith exception, applicable even when the police conduct did not have the prior approval of the magistrate, would be perceived and treated by police as a license to engage in the same conduct in the future. That is, the risk in such tampering with the exclusionary rule 'is that police may feel that they have been unleashed' and consequently may govern their future conduct by what passed the good faith test in court rather than on the traditional Fourth Amendment standards of probable cause, exigent circumstances and the like.

1 LaFave, Sec. 1.2, at 35 (1986 Supp.), quoting Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence (1977).

At the same time, the impact on

personal privacy is qualitatively different in warrantless search cases than it was in Leon. The right to be free from warrantless searches and seizures stands at the heart of the evils which the Fourth Amendment sought to avoid.[16] The Court's "strong preference for warrants," United States v. Leon, supra, 468 U.S. at ___, 104 S.Ct. at 3417, stems from its recognition that, however intrusive a search pursuant to a warrant lacking in probable cause or

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16 See United States v. Payton, 445 U.S. 573 (1980). As Justice Frankfurter explained in Wolf v. Colorado, 338 U.S. 25, 27-28 (1949):

> The security of one's privacy against arbitrary intrusion by the police--which is at the core of the Fourth Amendment--is basic to a free society...The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police did not need the commentary of history to be condemned....

sufficient particularity, that intrusiveness pales in comparison with that engendered by a warrantless invasion into one's home.

B. The Government's Arguments Equating The Efforts of Officials to Seek Judicial Clarification of Respondent's Probation Status with the Efforts of the Agents in Leon to Obtain A Warrant Are Disingenuous

The government claims that the actions of these officials in seeking judicial approval are the equivalent of the actions of the Leon officers in securing a warrant. This argument is totally disingenuous. The government officers here plainly had the time to investigate further and, if they had probable cause, to seek a warrant. But rather than taking the time to do what the Constitution required them to do, they chose only to seek clarification

that respondent was on probation. In effect, they used the judge not for the purpose of reviewing any particular search, but for the purpose of legitimizing their intent to conduct a warrantless search.

Far from being the equivalent of a warrant review, this "judicial clarification" process did not deal with the proposed search at all. Rather than seeking the narrow and precisely defined authority of a search warrant, these officers sought, without constitutional justification, to clothe themselves with the broad based discretion of an administrative officials. The officers did not apprise the judge of their intentions to search the property. They did not spell out where they planned to search and why, as would an officer in a warrant application. Indeed, they presented no facts

even describing their suspicions of probation violations -- although they had all the relevant facts at their disposal. The order that they received was not, like a warrant, limited to time, place and scope. If the perfunctory ceremony these officials went through in the instant case is held to be good faith, or worse, equivalent to the efforts of the officers in Leon to obtain a warrant, we will have trivialized the warrant process and returned to the days of general searches.

C. The Exceptions to the Warrant Requirement Already Incorporate A Reasonableness Test

Limiting the good-faith exception to cases involving warrant searches would not impair the ability of law enforcement officers to effectively perform their duties; the existing exceptions to the warrant requirement have been developed

with a careful eye to the reasonable needs of law enforcement.

This Court has already carved out a number of exceptions to the warrant requirement, holding warrantless searches within those specifically defined categories to be constitutionally permissible under two general theories -- that time constraints or other circumstances make obtaining a warrant too costly for law enforcement, or that the nature of the intrusion justifies a less than probable cause standard. See e.g., Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk on reasonable suspicion); Carroll v. United States, 267 U.S. 132 (1925 (automobile search); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain

view); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent search); and United States v. Ramsey, 431 U.S. 606 (1977) (border search); Camara v. Municipal Court, 387 U.S. 52 (1967) (administrative building search); Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (administrative business search).

Moreover, the Court has exhibited flexibility in applying these exceptions to particular cases. The Court has naturally considered the reasonableness of the searching officer's behavior where, for example, the officer has reasonably searched pursuant to the authority of an ordinance subsequently invalidated. See e.g., Michigan v. DeFillippo, 443 U.S. 31 (1979). And in limited categories of cases the Court has relieved the officer of the burden of demonstrating that the particular

warrantless search at issue was supported by the need for prompt action or the limited nature of the intrusion. See e.g., Illinois v. LaFayette, 462 U.S. 640, 643-647 (1983) (inventory search permissible irrespective of exigent circumstances because "the inventory search is a well-defined exception to the warrant requirement"); Florida v. Meyers ___U.S.___, 104 S.Ct. 1852 (1984) (automobile exception applied to uphold search of impounded vehicle despite vehicle's lack of mobility).

However, with respect to unsettled or ambiguous areas, the Court has refused to delegate the initial authority to determine the nature and scope of exceptions to the warrant requirement to the officer in the field. For example, it has not sanctioned what were described by the government as "reasonable errors" on

the part of police seeking to create a new exception to the warrant requirement, Thompson v. Louisiana, ___U.S.___, 105 S.Ct. 409 (1984) (rejection of "murder scene" exception); Steagald v. United States, 451 U.S. 204 (1981) (rejection of a warrantless search of a person's home pursuant to an arrest warrant for another individual).

The extension of the good-faith exception to every warrantless search would have precisely this effect. It would encourage an officer to rely on his own conclusion that an exception to the warrant requirement was implicated, since the question of whether or not the search was reasonable under the Fourth Amendment would be replaced with the question of whether an officer reasonably believed that to be the case. Unlike the good faith rule in Leon, where the officers'

obligations under the Warrant Clause had already been met, the extension of the exception here would recast the Fourth Amendment's specific proscriptions as a general and vague reasonableness requirement, thereby eviscerating them.

D. The Application of a Good Faith Exception to Warrantless Searches Would Seriously Undermine the Development of Clear Decisional Law Delineating Precise Exceptions to the Warrant Requirement

In Leon, the Court dismissed the concern that the good faith exception would stifle the development of the Fourth Amendment law in warrant cases because it concluded that judges would continue to examine the constitutionality of the magistrate's issuance of a warrant before turning to the question of the reasonableness of the police officer's reliance on it. However, the concern for the lack of development of decisional law

applies with special significance to the application of the good faith exception to warrantless searches.

First, there is no area of Fourth Amendment law where clearly articulated judicial rules are more necessary than in the area of exceptions to the warrant requirement. See United States v. Belton, 433 U.S. 454 (1981). Only by sending clear signals to the police about the limited scope of the exceptions to the warrant requirement can the Court ensure that these officials will abide by the constitutional mandates. Thus, this Court has frequently opted to define warrantless searches by categories rather than by engaging in post-hoc case by case analysis. For example, the Court has created a generic "inventory search" category, Illinois v. Lafayette, supra, or a generic "car search" category,

Coolidge v. New Hampshire, supra, rather than requiring the police to independently demonstrate exigent circumstances in each case. Moreover, while, at the very minimum, Leon told officers to get a warrant, extending the good faith exception to warrantless searches would muddy the very rules concerning when a warrant was required.

Second, if a good faith exception is applied to warrantless searches, there will be an increased risk that reviewing courts will gloss over the constitional violation. In a search warrant case, the reviewing court can function vis a vis the magistrate's order to search, much like an appellate court vis a vis a lower court's decision. As in appellate review, there is a judicial judgment, i.e., a search warrant, and a fixed pre-search record, i.e., the affidavit in support of

the warrant. Like an appellate court deciding whether there is a constitutional violation, followed by a determination of whether there is harmless error, a district court can determine whether the magistrate erred in issuing the search warrant, and only then turn to the reasonableness of the police conduct.

In a warrantless search case, in contrast, the court will have no prior judicial order, and no fixed pre-search record. The only issue the court will be reviewing will be the police officer's conduct. Morever, if Leon were extended to warrantless searches, there is every reason to believe that the post-search record will be cast largely in terms of the police officer's good faith. Finally, since the good faith issue will arise largely at the boundaries of the law, where the law is unsettled, unclear, or

never before addressed, the reviewing court will have every incentive to decide only whether the police reasonably believed that a warrantless search was permissible under the circumstances, without expressly reaching the question of whether or not there was a constitutional violation. Indeed, one of the first "good faith" cases, United States v. Williams, 622 F.2d 830 (5th Cir. 1980) cert.den., 449 U.S. 1127 (1981), which involved a warrantless search, illustrates these dangers. The court disposed of the case without deciding the precise violation committed by the officer.

The result of this will be a stagnation in the development of the Fourth Amendment in the context of warrantless searches. Today's bright line rules and categorical exceptions will shade into a

murky blend of cases in which warrantless searches are excused post-hoc as "reasonable". Judicial oversight of police behavior in an area as central to personal privacy as this will necessarily suffer. See generally, Ingber, "Defending the Citadel: The Dangerous Attack of 'Reasonable Good Faith'", 31 Vanderbilt L.R. 1, 48 (1982); Mertens & Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law", 70 Georgetown L. J. 365, 431 (1981).

## CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 25 1987
JOSEPH F [illegible] JR.
CLERK

No. 85-1672

# In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM D. MERCHANT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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UNITED STATES OF AMERICA, PETITIONER

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

1. Respondent makes virtually no attempt to defend the court of appeals' ruling that the February 27, 1981, municipal court hearing was invalid because he was not personally notified about it. In our opening brief, we argued that notice to a defendant's attorney of any proceeding that occurs during the course of a criminal prosecution satisfies any due process requirement that the defendant himself be notified. Respondent's entire answer (Resp. Br. 22) is that *Faretta* v. *California*, 422 U.S. 806 (1975), held that the right to notice is personal to the accused. As we have explained (U.S. Br. 18-19), however, the passage in *Faretta* on which respondent relies states only that a defendant must be informed of the charges against him. That proposition is wholly irrelevant to the question presented by this case.

Rather than defend the court of appeals' ruling, respondent argues (Resp. Br. 12-25) that the February 27 hearing was invalid because he was not present. The court of appeals left that question open (Pet. App. 10a n.5), and there is no need for the Court to resolve it in this case. If the evidence seized from respondent's residence during the

March 3, 1981, search was admissible under the good faith exception to the exclusionary rule adopted in *United States* v. *Leon,* 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard,* 468 U.S. 981 (1984), the court of appeals' judgment must be reversed and respondent's conviction reinstated regardless of whether the February 27 hearing was flawed because respondent was absent. In any event, respondent was not denied due process because he was absent from the February 27 hearing.

A defendant has a right to be present at his trial and at a variety of proceedings that occur both before and after the jury renders its verdict. The Due Process Clause, however, does not give the defendant the right to be present at every proceeding in a criminal case. Instead, the presence of a defendant is a condition of due process "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder* v. *Massachusetts,* 291 U.S. 97, 108 (1934); see also *United States* v. *Gagnon,* 470 U.S. 522, 526 (1985). Among the kinds of proceedings that may be held in a defendant's absence are those devoted to purely legal questions. See Fed. R. Crim. P. 43(c)(3) (defendant need not be present "[a]t a conference or argument upon a question of law"); *Price* v. *Johnston,* 334 U.S. 266, 285 (1948) (defendant's presence unnecessary at appellate proceedings).

The February 27 hearing falls squarely into that category of proceedings. There were only two questions before the municipal court at that hearing: (1) whether the court's November 14, 1980, order stayed respondent's probation in its entirety or only that part imposing a period of six months' confinement, and (2) if the order stayed respondent's probation in its entirety, whether that stay should be lifted (see J.A. 44-46). Both questions involved legal considerations that defense counsel could effectively address in his client's absence. Nor was there anything unusual about the proceeding that might have required

respondent's presence. The prosecutor did not offer any evidence, and respondent's attorney did not argue that an evidentiary hearing was necessary. There was therefore no factual issue raised at the hearing as to which respondent's presence may have been helpful. Moreover, respondent's attorney did not suggest that there were any new facts justifying a continued stay of the probation order. In fact, respondent's counsel did not even contest the prosecutor's motion. On the contrary, respondent's attorney agreed that the prosecutor's motion was "well taken" (Pet. App. 22a). Finally, it is immaterial that the effect of the court's February 27 order was to advance the date on which the conditions of respondent's probation would go into effect. Respondent was present at sentencing when those conditions were imposed, and a prisoner does not have a right to be present when a stay of the execution of his sentence is lifted. See *Schwab* v. *Berggren,* 143 U.S. 442, 451 (1892) (prisoner has no right to be present when an appellate court fixes the date of execution on a sentence imposed by the trial court). In these circumstances, respondent could not have been prejudiced by his absence from the February 27 hearing. Cf. *Snyder,* 291 U.S. at 109 ("the risk of injustice to the prisoner" from allowing the jury to view the crime scene in his absence "ceases to be even a shadow" when he admits that the jury was shown the correct scene).[1]

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[1] Even if the failure by respondent's counsel to object at the hearing to going forward in his client's absence does not amount to a waiver of respondent's claim (but cf., *e.g., Howard* v. *Kentucky,* 200 U.S. 164, 173 (1906) (due process not violated by trial court's in camera questioning of juror in the absence of the defendant and defense counsel when defense counsel had agreed to that procedure)), the lack of an objection by respondent's attorney adds support to the conclusion that respondent was not prejudiced (see *Gagnon,* 470 U.S. at 529; see generally *Wainwright* v. *Witt,* 469 U.S. 412, 431 n.11 (1985)).

Respondent argues (Resp. Br. 20-21) that he was prejudiced in several ways because he was not present at that proceeding. For example, respondent claims (Resp. Br. 16-18, 21) that he lost the right to be free from a warrantless search by his absence from that hearing because he did not consent to the search condition of his probation at sentencing. The record does not support that claim.

At sentencing, the municipal court clearly told respondent that one of the conditions of his probation was that he would be subject to warrantless searches during the term of his probation (J.A. 40). Respondent did not object to that condition; he objected only to the six-month period of confinement (*id.* at 39-42). At the end of the sentencing hearing, respondent signed the court's judgment of probation immediately below a printed statement reciting that "I have received a copy, read and understand the above conditions of probation" (*id.* at 33). Under the heading "Conditions of Probation," the judgment required respondent to consent to the warrantless search of his residence by any law enforcement officer (*ibid.*). By signing the judgment, respondent gave his consent under state law to the search condition of his probation. See *People* v. *Byrd,* 38 Cal. App. 3d 941, 948, 113 Cal. Rptr. 777, 782 (1974).[2]

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[2] There is no merit to respondent's argument (Resp. Br. 15-16) that probation in California is similar to a plea bargain. In *People* v. *Mason,* 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), cert. denied, 405 U.S. 1016 (1972), and *People* v. *Superior Court,* 12 Cal. 3d 858, 528 P.2d 41, 117 Cal. Rptr. 433 (1974), the California courts recognized that consent-to-search probation conditions were valid, but in neither case did the court hold that a defendant must be apprised at sentencing that he has waived his Fourth Amendment rights. *Blair* v. *Pitchess,* 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), on which respondent relies, did not involve a probation search at all. In addition, the California Supreme Court's most recent decision on this topic, *People* v. *Burgener,* 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986), upheld a similar condition on a parolee

Respondent also contends (Resp. Br. 13-14, 21) that his absence from the hearing deprived him of the opportunity to ask the court to modify or eliminate the search condition, or to refuse probation and accept the six-month period of incarceration instead. The municipal judge, however, was insistent that respondent not possess firearms during his probation (U.S. Br. 33; J.A. 38-39). For that reason, it is highly dubious that the court would have been willing to eliminate the condition that allowed the firearms restriction to be enforced. Respondent's claim that he might have agreed to confinement rather than accept probation is also speculative. The only evidence respondent cites to support that claim is his own affidavit submitted at the suppression hearing in this case (J.A. 92-93). Even the affidavit does not suggest that respondent would have accepted confinement rather than probation; it says only that he signed the probation form on the advice of his attorney that signing the form was necessary to obtain a stay pending appeal. Moreover, at sentencing respondent objected only to the confinement period, not to the search condition (J.A. 40). Thus, respondent's position at the sentencing hearing is inconsistent with the position he subsequently took in the affidavit he filed in connection with his suppression motion, when it was clearly in his interest to claim that he would not have accepted immediate probation.

Finally, respondent argues (Resp. Br. 21) that his absence from the hearing prevented him from learning of the state court's February 27 order and from conforming his conduct to the requirements of his probation by getting rid of the firearms that were discovered at his home. The

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after balancing the governmental and private interests, rather than by relying on a waiver or consent theory (41 Cal. 3d at 535-536, 714 P.2d at 1270-1271, 224 Cal. Rptr. at 132-133, citing *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985)).

risk that a defendant might not learn the outcome of a particular proceeding is not a sufficient reason to require the defendant's presence at that proceeding. If it were, there would be no proceeding in a criminal case that would be constitutionally valid if conducted in the defendant's absence. A defendant's lack of notice of an order entered in his absence may have other consequences—such as giving him a defense against sanctions for violating the order—but it does not render the order void *ab initio*.

This case provides an instructive illustration of this distinction. Because respondent did not learn of the municipal court's February 27 order, the state superior court held that respondent's probation could not be revoked for violating that order. *People* v. *Merchant*, No. 296 (Cal. Super. Ct. Nov. 17, 1981), slip op. 2 (J.A. 200). That court noted, however (*ibid.*), that respondent's lack of notice of the municipal court's order did not mean that the order was invalid or that the search of respondent's residence was unlawful.[3]

2. Respondent (Resp. Br. 26-38) and amici (ACLU Br. 12-56) argue that the good faith exception to the exclusionary rule should not be applied beyond the warrant context. The good faith exception, they argue, was de-

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[3] Respondent also argues (Resp. Br. 18-20) that he was deprived of his state law right to be present at the hearing. California law does not differ from federal law on this point, however. The state courts have consistently applied the test adopted by this Court in *Snyder*, 291 U.S. at 105-108, and reiterated in *Gagnon*, 470 U.S. at 526, to determine whether a defendant's right to be present has been abridged. *People* v. *Jackson*, 28 Cal. 3d 264, 309, 618 P.2d 149, 172, 168 Cal. Rptr. 603, 626 (1980), cert. denied, 450 U.S. 1035 (1981); *In re Lessard*, 62 Cal. 2d 497, 505-507, 399 P.2d 39, 45, 42 Cal. Rptr. 583, 589 (1965); *People* v. *Abbott*, 47 Cal. 2d 362, 372, 303 P.2d 730, 737 (1956); *People* v. *Isby*, 30 Cal. 2d 879, 894, 186 P.2d 405, 414 (1947). That test requires a defendant to show that he was prejudiced. For the reasons given above, respondent was not prejudiced by his absence from the February 27 proceeding. Respondent's argument therefore fares no better under state law than under the Due Process Clause.

signed to encourage police officers to obtain warrants before executing a search; no similar Fourth Amendment policy, they contend, is served by encouraging officers to rely on a consent-to-search condition.

That argument misconstrues the Court's opinion in *United States* v. *Leon, supra. Leon* reiterated the familiar principles that a warrant-authorized search is preferable to a warrantless search and that Fourth Amendment rules should be designed to encourage police officers to resort to the warrant process. 468 U.S. at 914. But those are principles of substantive Fourth Amendment law; they do not govern the question whether the exclusionary rule should apply in a particular case once a Fourth Amendment violation has been found. The applicability of the exclusionary rule depends on whether the exclusion of evidence in a particular case would have "any deterrent effect * * * [on] the behavior of individual law enforcement officers or the policies of their departments" (*id.* at 918). *Leon* concluded that when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, the exclusionary rule is a particularly ineffective deterrent, because in most such cases any error is attributable to the court, not to the officer (*id.* at 920-921). Under that analysis, the good faith exception is not tied to the policy of encouraging resort to the warrant process. Instead, the exception is based on the deterrent effect of the exclusionary sanction in particular contexts.

The Court's determination in *Leon* that the exclusionary rule cannot deter objectively reasonable police conduct does not depend on the type of authority on which a police officer relies. The exclusionary rule will not deter a police officer from conducting a search that he reasonably believes to be authorized. The relevant question therefore is whether an officer had an objectively reasonable belief

that his conduct was lawful, not whether the officer relied on a search warrant rather than some other form of judicial authorization, such as a consent-to-search clause.

Respondent argues (Resp. Br. 32-33) that the good faith exception should not be applied to a consent-to-search condition of probation because of the difficulty in determining whether a law enforcement officer has an objectively reasonable belief that his conduct is lawful. That difficulty, respondent claims, stems from the fact that under California law a police officer may rely on such a condition at any time after a judgment of probation is entered, even if he did not participate in the proceedings at which the condition was imposed.

We see no special difficulty in applying the good faith exception in this context. Because a state court judgment is presumptively valid (see *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967)),[4] an officer who executes a probation search should be entitled to rely on the judgment of probation even if he did not participate in the trial court proceedings. Beyond that, the good faith exception presupposes that a police officer is reasonably well trained and is aware of the relevant legal principles, including recent developments in the law. In this case, there was no development that should have put the searching party on notice that the municipal court's probation judgment or its February 27 order was defective (U.S. Br. 27 n.16). Accordingly, there is no reason to suppress evidence acquired as the result of an objectively reasonable search simply

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[4] Respondent is wrong in suggesting that a consent-to-search clause is a disfavored source of authority under California law. The state supreme court has upheld these conditions of probation for nearly 15 years without suggesting that they are a questionable source of authority to execute a search. See *People* v. *Mason*, *supra*; *People* v. *Burgener*, *supra*.

because the court that entered the order on which the search was based made a technical mistake in the process of entering the order.[5]

3. Respondent also maintains (Resp. Br. 26-31, 33-38) that the prosecutor's and officers' actions were not objectively reasonable, but his argument is premised on several factual inaccuracies.[6] Beyond that, respondent's arguments amount to little more than second-guessing the actions of the prosecutor and the police.

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[5] Amici contend (ACLU Br. 46-51) that it is unnecessary to apply the good faith exception to warrantless searches because the exceptions to the warrant requirement already authorize reasonable police conduct. The fact that some warrantless searches are lawful does not somehow render the good faith exception inapplicable when a police officer has reasonably but mistakenly engaged in an unlawful warrantless search. As we have noted, the deterrence rationale that underlies the exclusionary rule does not have any force when police officers are acting in reasonable reliance on an apparently valid authorization to search, whether or not the authorization takes the form of a warrant.

There is also no force to the argument (ACLU Br. 51-56) that applying the good faith exception in the present context will retard the development of Fourth Amendment law. *Leon* rejected the identical argument in the context of a warrant-authorized search (468 U.S. at 924-925), and the Court's reasoning is fully applicable here. As the Court explained in *Leon*, the benefits of suppression are sufficient to ensure that defendants will continue to raise colorable Fourth Amendment claims (*id.* at 924 n.25), and the good faith exception will not prevent courts from addressing the merits of Fourth Amendment claims when it is necessary to provide guidance to law enforcement officers (*id.* at 925).

[6] For example, respondent asserts (Resp. Br. 36) that the municipal court judge was "ambivalen[t]" about the legality of the search when he was contacted by respondent's attorney after the prosecutor and officers arrived at respondent's home. In fact, the judge simply declined to take a position whether the search was lawful. See J.A. 74-75. In addition, respondent asserts (Resp. Br. 26-27 (emphasis in original)) that "the officers (under the prosecutor's guidance) determined to enter respondent's residence with full knowledge that his probation

Respondent contends (Resp. Br. 27) that the search was not related to his probation supervision, because he had not been assigned a probation officer. But, as we have explained (U.S. Br. 32-33), the search was clearly related to the protection of the public and the rehabilitation of respondent, both of which are goals of the probation process in California. That is all California law requires. Supervision is not a goal of the probation process, but is the method by which the goals of probation are attained (see U.S. Br. 32 n.19). A search of a probationer is one of the ways that he is supervised. See *People* v. *Mason,* 5 Cal. 3d 759, 763-764, 488 P.2d 630, 632, 97 Cal. Rptr. 302, 304 (1971), cert. denied, 405 U.S. 1016 (1972).

Similarly, respondent argues (Resp. Br. 29-30) that the prosecutor acted unreasonably because she went ahead with the search after respondent and his lawyer told her that respondent was unaware of the February 27 order. But respondent's argument asks too much of the searching team. The municipal court's judgment of probation and its February 27 order were facially valid, and it would be

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had *not yet even begun.*" In fact, the prosecutor testified only that respondent did not have a probation officer assigned at the time of the search and that she did not contact the probation office before conducting the search. J.A. 76-77. It is irrelevant that the prosecutor did not contact the probation department before respondent's home was searched. We have explained (U.S. Br. 30) and respondent concedes (Resp. Br. 32) that California law does not require a probation officer to be a party to the search of a probationer. The prosecutor therefore had no need to contact the probation department. Additionally, as we have explained (U.S. Br. 32 n.19) and as respondent concedes (Resp. Br. 34 n.29), in California the county probation department is responsible for determining the level of supervision for a probationer. Here, the probation department did not assign respondent a probation officer because he had appealed his convictions (U.S. Br. 32 n.19; J.A. 89). Even if that eminently reasonable decision was erroneous for some reason, any fault lies with the probation department, not the prosecutor, and it does not undermine the reasonableness of the search in this case.

unreasonable to require a police officer to terminate an ongoing search whenever a person (or his lawyer) claims that the order authorizing the search was somehow defective, regardless of how fervent those claims may be.

There is nothing about this case that requires a different result. Nothing that the prosecutor knew, should have known, or was told could have led a reasonable person to conclude that the municipal court's orders were invalid. Although the prosecutor knew that the state municipal court had stayed at least part of respondent's probation, the court of appeals' ruling that respondent's probation was stayed in its entirety (Pet. App. 6a) rested on a decision (*In re Kennick*, 128 Cal. App. 3d 959, 180 Cal. Rptr. 731 (1982)) that was handed down *after* the search in this case. Moreover, while the prosecutor knew that respondent was not present at the February 27 hearing, she cannot reasonably be charged with anticipating that the order entered at that hearing would be invalidated because of respondent's absence on that day. It was therefore reasonable for the search team to rely on the probation judgment and the February 27 order, rather than to accept uncritically the protestations of respondent and his attorney.

Respondent also maintains (Resp. Br. 27) that, because the reports of gunfire on his property came at a time that he did not believe he was forbidden to possess firearms, it was unreasonable for the prosecutor to conclude that respondent would not rid himself of his firearms once he learned that the probation order had gone into effect. That argument, however, misstates the relevant inquiry. Under *Leon*, the question is not whether *respondent* reasonably believed that he was *not* on probation, but whether the *prosecutor* and *police* reasonably believed that he *was*. As we have explained (U.S. Br. 26-27), the record in respondent's case amply supported the prosecutor's conclusion that respondent was on probation, and the best

proof that the prosecutor's belief was reasonable is that the state municipal court and the district court concluded (U.S. Br. 8 n.6; Pet. App. 17a) that respondent was in fact on probation at the time of the search. See *Leon*, 468 U.S. at 926; U.S. Br. 28.[7]

For the foregoing reasons and those given in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

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[7] Respondent contends in passing (Resp. Br. 27) that the prosecutor had no reason to believe that respondent possessed firearms at the time of the search, since the reports of gunfire on his property were several weeks old by then. Respondent had been recently convicted of brandishing weapons in public, and he apparently had been wrongfully involved with firearms beforehand as well (U.S. Br. 33 & n.20; J.A. 38-39, 42-43, 159-161). In light of respondent's use of firearms on prior occasions, the prosecutor was entitled to conclude that respondent had resumed his former ways and was continuing to possess firearms at the time of the probation search.

U.S. GOVERNMENT PRINTING OFFICE: 1986—161-463:40227